

# Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns

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## I. INTRODUCTION

This Essay is about the main chance. It is presumptuous and risky. Presumptuous because it purports to identify the values and concerns that should occupy center stage when we decide how to structure court-connected alternative dispute resolution (ADR) programs. Risky because it will be irrelevant to policymakers who do not agree (either as a matter of philosophic election or fiscal necessity) that the values and concerns I identify should or can play ascendant roles in this comparative analysis.

I believe, however, that it is very important, at the outset of a process of making policy decisions like these, to pressure ourselves to identify the values that are most important to us—so that when we make the choices among structural alternatives that we must make, we will be sure to advance and protect those values to the maximum extent possible. One purpose of this Essay, then, is to provoke self-consciousness and debate about values—to press us to identify and prioritize our goals, interests, and concerns.

This Essay's second purpose is to use the values that I think are most important to conduct a comparative assessment of the five most common ways of structuring court-connected mediation programs. I would like to contribute toward refining our thinking about the implications of each alternative model for the values that are most important to us. We will find that a complex picture emerges even when we limit our field of vision to these ascendant values—that each model presents a rich constellation of pros and cons—and that we are forced to make difficult choices even among our most precious values when we try to decide which alternative is, ultimately, the most attractive. We also will find that our analysis (and the choice to which it points) will vary with the purposes and characteristics of the particular program in question. Different ADR programs may well have different fundamental purposes—and there already is immense diversity in the characteristics and circumstances of court-connected ADR programs around the country.

The ascendant purposes of programs can range from simply getting more cases settled (or settled earlier), to providing process alternatives that better fit the needs or circumstances of some litigants than traditional adversary litigation (thus encouraging a perception of courts as service-oriented institutions), to enhancing the parties' sense of and capacity for self-determination, to encouraging parties to reorient their primary instincts and

to elevate concern for others, or for the social whole, above concern for self.<sup>1</sup> Similarly, there can be quite a range in the level of ambition that accompanies a court's program: one court, for example, might care only about how its program directly affects the court (e.g., its docket pressures and its economic burdens), while another court might want its program to have broader effects—contributing to changes in the legal culture, or perhaps more generally to social dynamics and to the political and economic character and health of our society. The courts' visions, in other words, can range from dockets to democracy.

What is important to acknowledge at this point is that how a court defines the primary purpose of its program, and how that court prioritizes the values and interests its program could serve, could dramatically affect that court's thinking about which model or system for delivering ADR services is most attractive.

At a less abstract, but arguably no less important level, there are a host of different program and circumstance variables that could substantially affect what the pros and cons of the different ADR delivery systems might be. Thus, what those pros and cons are might depend significantly on, among other things, the kinds of cases being served;<sup>2</sup> the kinds of parties who generally participate; whether the parties are represented by lawyers or other professionals; what kinds of people serve as the neutrals (e.g., lawyers, judges, professionals from other disciplines, or citizens without professional affiliation or background); the character of the role the neutral is to play (e.g., purely facilitative, or in some measure evaluative, or helping the parties devise case development plans); what powers, if any, the court confers on the neutrals and what kind of training and monitoring they receive; whether participation in the ADR program is voluntary (really) or mandatory (as a matter of rule or of sociological reality); whether the parties are required to pay for the ADR services (and, if so, how substantial those charges are); the court's budget constraints; as well as the magnitude of docket pressures and

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<sup>1</sup> Citations to sources that elaborate some of these kinds of purposes are presented *infra* notes 10–12.

<sup>2</sup> The range of case types that court-connected ADR programs have served is very broad and includes, among others, neighborhood disputes, criminal matters (usually at the petty offense or misdemeanor level), family law, probate, auto personal injury, general civil, complex commercial or intellectual property, proceedings in bankruptcy, civil rights, and matters pending at the appellate level.

the time frames within which the court can deliver key elements of traditional litigation services (e.g., trial dates and rulings on major motions).<sup>3</sup>

The relative attractiveness of the different models also can depend on local or regional demographic and cultural variables. For example, the nature and severity of conflict of interest problems for neutrals, and the implications of ceilings on what courts could pay neutrals, might be quite different for a court in a rural setting than for a court in a major metropolitan area. And even among courts that are similarly situated demographically there can be considerable differences in local legal culture—especially in the extent to which that culture has embraced ADR generally and can produce motivated, skilled neutrals who are willing to serve in a court's program, perhaps for relatively modest compensation or for no pay at all.

In addition, we must acknowledge that the play among variables like those identified in the preceding paragraphs can change over time—with, among other things, the maturity of a court's program, the evolution of the local ADR culture, changes in budget constraints, and changes in the characteristics of the court's docket.

So when we try to compare the pros and cons of the different models or systems that might be used for delivering ADR services, we confront a situation that is simultaneously fluid and extremely complex. These facts of life have several consequences. One is to make the task of formulating reliable policy in this arena an ongoing challenge, an undertaking that must continue, at least at some level of self-assessment, indefinitely. Courts must build in systems for periodic review of their objectives, their circumstances, and the effectiveness of their programs (measured against their own re-assessed objectives and prioritized values). And when selecting a system for delivering ADR services, courts should try to make judgments about the likelihood that they will need to make changes in their system, and how radical those changes might be. These kinds of predictions can help courts ascribe relative importance to one of the features with respect to which there might be

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<sup>3</sup> In this Essay I assume that the ADR processes in all of the programs that we are comparing are fully nonbinding, meaning, among other things, that the participants are under no duty to reach an agreement, that the mediator has no power to impose an outcome, and that no party faces the risk of any kind of sanction or penalty for declining either to enter an agreement or to follow any suggestion or course of action that the mediator might recommend. "Binding mediation" is an oxymoron, and using "negative incentives" or threats of penalties to pressure parties into anything more than participating in a mediation session itself would pose serious threats not only to the values that inform mediation theory, but also to the values (identified in the next section of the text) that I believe every court-connected ADR program should strive to promote.

significant differences between the models: how adaptable they are and what the institutional and political or sociological barriers to changing them might be.<sup>4</sup>

Even without worrying about changes over time, however, the reach and diversity of current state court ADR programs makes the job of comparing the different models for delivering ADR services extraordinarily difficult and analytically dangerous. The difficulty is a function of the huge number of variables that could significantly affect the character and outcome of the analysis. The danger is a function of the fact that we cannot assume that conclusions that are valid for one program, in one specific setting, will be valid for programs in other, inevitably somewhat different settings.

Having acknowledged all of these considerations, we also must face the fact that at least in some courts or court systems some policy decisions must be made now, for and in the circumstances that exist today. Spurred by that fact of life, each of us who has been asked to contribute an essay to this project hopes that we can (1) provide some food for comparative thought to the policy makers who must decide now how to structure their ADR programs, (2) identify some important questions that we cannot answer confidently with the information currently available—and in so doing suggest issues that empirical research might productively explore,<sup>5</sup> and (3) despite the thicket of variables that surrounds us, identify some pros and some cons that are likely to attach to the different models in a range of settings—in the hope that some of the analysis we can make now will be useful to people working

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<sup>4</sup> Judgments about the relative adaptability of the different models can be difficult, and can vary substantially from setting to setting. Just as an example, I note that the difficulty of changing a system in which a court has formed a partnership with an outside institution can depend on a host of variables, including how much capacity for flexibility that outside institution has and the magnitude of its political clout. Similarly, how hard it might be to change a system in which the ADR services are provided by private individuals who are paid by the court or the parties could depend, in part, on the extent to which those individuals have come to depend on income from this work, how large and cohesive the group is, and how well connected its members are.

<sup>5</sup> The severity of the problem posed by the thinness of the empirical base for making these comparisons varies in some measure with the nature of the values or program characteristics that are being compared. For some of the abstract or philosophic values that I believe should drive the comparisons, the relative scarcity of empirical data is not disabling. On the other hand, readers will see that many of the points I make are based on assumptions about human nature, guesses about how different program characteristics are likely to make most parties feel, and “common sense”—which is likely to be a euphemism covering unarticulated values and speculation about how the social dynamic is likely to work.

## COMPARING STRUCTURES FOR DELIVERY OF ADR SERVICES BY COURTS

in several different kinds of program environments.<sup>6</sup>

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<sup>6</sup> Even though the administrators of ADR programs in five states have provided me with a great deal of information over the past several months, what I write and think about court involvement in ADR is likely to be influenced, in ways I do not always appreciate, by my experience with the ADR program in the United States District Court for the Northern District of California. I should disclose, therefore, some basic facts about that program. *See generally* N.D. CAL. ALTERNATIVE DISP. RESOL. LOCAL R. (1998).

It began in 1978 with a mandatory, nonbinding arbitration program that primarily reached contract and personal injury cases involving less than \$100,000 in money damages. In the mid-1980s we added an early neutral evaluation program that reached a wide range of civil actions, and in the early 1990s we added mediation and a multi-option program. *See* N.D. CAL. ALTERNATIVE DISP. RESOL. LOCAL R. 3, 5 (1998). In the spring of 1999, the court decided to extend the multi-option program, with modifications, to all judges in all of the court's divisions.

Program design and implementation relied on "borrowed" time from one magistrate judge (me) and from a few members of the Clerk's office until the Civil Justice Reform Act (CJRA) permitted us to hire professionals in 1991. Since then, two lawyers with substantial experience in ADR and in civil litigation have run the program, under my general oversight. While these lawyers occasionally serve as neutrals, the vast majority of their time is devoted to program design, training, rule writing, program evaluation, and higher level program administration. They have been assisted, indispensably, by a professional administrator (who now has a masters degree in public policy and administration) and by two or three case systems administrators.

Our ADR program has reached a wide range of civil cases, but not matters involving family law, probate, or criminal prosecutions. Our program serves parties proceeding *in propria persona* primarily through settlement conferences with magistrate judges—only rarely are *in propria persona* cases admitted to the arbitration, early neutral evaluation (ENE), or mediation programs.

Only lawyers and judges have served as neutrals in our program—though we are exploring now the possibility of using other professionals in some settings (e.g., mediating with a lawyer neutral). The ADR program in our bankruptcy court, which was independently designed and is separately administered, sometimes uses accountants or people with pertinent business backgrounds as neutrals.

The vast majority of the neutrals who serve in our mediation and ENE programs are private lawyers who are not paid for their work—they volunteer to be trained and they agree to serve in three or more cases a year without compensation. Our rules permit compensation for the neutrals in these programs only in unusual cases, in which the neutral serves for more than several hours. "Arbitrators" in our nonbinding program are compensated at below market rates (\$250 per day if serving alone) with funds provided by Congress. No fee is charged to the parties for participation in the ADR programs.

For a relatively recent study of how the program operates in the Northern District and how lawyers, litigants, and judges perceive its pluses and minuses, see DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS

## II. THE VALUES THAT SHOULD DOMINATE THE CHOICES WE MAKE

There are scores of different considerations, interests, values, and concerns that decisionmakers could take into account when they compare different ways of structuring court-connected ADR programs. That fact creates a risk that when we make the comparisons we will lose track of the main chance—that confusion or want of focus will lead us to make choices that we would not make if we kept firmly in mind what is most important to us. We also must acknowledge that, at least in some settings, some of the values and interests that are at play here are mutually exclusive. So we must make choices. Before we choose, we should have a clear idea of what our priorities are—which values we can least afford to compromise or place in jeopardy.

### A. Toward Defining “Quality Service” by Neutrals in Court-Sponsored ADR Programs

To focus our discussion, I would like to begin by acknowledging what can be a deep and difficult tension between two core values or interests—a tension that designers of court-sponsored ADR programs perennially are required to confront. This is the tension between quality and quantity—between, on the one hand, insisting that the services provided by the neutrals in the court’s program are of very high quality and, on the other, the desire to offer ADR services to the largest possible number of litigants.

Given the importance of democratizing access to justice, and to taxpayer-supported governmental services generally, we should be prepared to live with some reduction in our level of assurance that the work performed by every ADR neutral is of the highest quality—if the trade-off is an ability to offer valued dispute resolution help to appreciable numbers of litigants who otherwise would not be served at all. But the public’s capacity and willingness to fund the courts and their programs is limited—in some places, very limited. And access to private funding for court-sponsored ADR programs is legally

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ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 173–214 (1997) (available from the Federal Judicial Center and on file with the *Ohio State Journal on Dispute Resolution*) (report on the five federal district courts designated under the Civil Justice Reform Act of 1990 as demonstration districts for experimentation with different systems of case management). Chapter IV of the report focuses on “The Northern District of California’s ADR and Multi-Option Programs.” *See id.*



and politically complicated, at a minimum.<sup>7</sup> Moreover, user-pay programs can result in some classes of cases or litigants being effectively denied access to these potentially valuable services.

These facts of life mean that there likely will always be real limits on the resources that courts will be able to commit to their ADR programs. If those real limits force courts to choose between volume and quality, I believe the former always must be sacrificed for the latter.<sup>8</sup> We should refuse to operate

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<sup>7</sup> For example, there appear to be substantial constraints of the federal courts' authority to use funds from any source other than Congress to support the delivery of services or the performance of functions that Congress requires the federal courts to deliver or perform, or for which Congress makes appropriations (regardless of the sufficiency of the amounts appropriated). Among other constraints, the prevailing view seems to be that federal courts cannot use funds from private sources to "augment" appropriations by Congress. *See, e.g.*, 28 U.S.C. § 604 (1994); 31 U.S.C. § 1517 (1994); *see also* Letter from William R. Burchill, Jr., Associate Director and General Counsel, Administrative Office of the United States Courts, to Circuit Executive, United States Court of Appeals (Dec. 9, 1994) (on file with the *Ohio State Journal on Dispute Resolution*).

These notations generate difficult questions when Congress imposes duties on federal courts, authorizes appropriations to carry out the duties, but in fact appropriates no money—as appears to have happened in the Alternative Dispute Resolution Act of 1998. *See* 28 U.S.C.A. §§ 651–658 (West Supp. 1999).

<sup>8</sup> A decision to offer service to a smaller number of cases is not necessarily anti-democratic and would not necessarily deny access to services to any class of cases or litigants. One program design alternative is to identify the individual cases that will be offered the ADR service through a process of random selection from within a wide range of classes of cases. Some courts in Ohio have experimented with an approach of this kind. *See* Memorandum from C. Eileen Pruett, Coordinator of Dispute Resolution Programs, Supreme Court of Ohio (Oct. 16, 1998) (copy on file at the office of the *Ohio State Journal on Dispute Resolution*). These courts take the position that "if mediation is being offered as a court service it should be available to parties in the same ratio as the types of cases filed." *Id.* at 6.

Under this approach, the court offers mediation to more automobile-personal injury cases than to the more complex product liability cases—because there are many more cases filed in the first category than in the second. *See id.* The Ohio courts who adopt this approach justify it in part on the ground that mediating more of the larger cases would consume a substantial percentage of the court's mediation resources—because the big cases are more time consuming for the mediators—and would leave more of the smaller case litigants without any access to mediation at all, because it usually is the smaller case litigants who cannot afford to go into the private sector to pay for mediation services. *See id.*

In the latter part of the 1980s the United States District Court for the Northern District of California responded to resource constraints in its ENE program by deciding to assign to the program only those cases that received an even docket number at the time of filing.

a program that is any larger or more ambitious than we can support at a high quality level—especially in programs where the court either requires participation in an ADR process or generates considerable momentum in that direction. Stated differently, if we are forced to choose, we should concentrate our resources in smaller, higher quality programs—rather than strain our resources to offer thin support for services in whose quality our confidence is substantially compromised.

Having taken this position, I hasten to make three related concessions. First, the concept of “quality” in this setting is not self-defining and is subject to a range of views. Moreover, what quality consists of can vary, to some extent at least, with the purposes and features of particular programs. I will return to this topic momentarily.

Second, even if we can agree on a definition of “high quality performance” by the ADR neutral, we are likely to discover that we do not have a solid empirical basis for determining how important a high quality performance really is. While, as I note later, some data has been collected that sheds some light on this question, we hardly have a definitive answer. So we are not sure how important high quality performance by the neutral is to participants in ADR processes, or to achieving the goals of particular programs—and we cannot be sure how big a threat poor quality performance poses to values we hold dear. We also cannot be sure that answers we might develop to these questions for any given program will be valid for other, different programs.

Third, we do not really know how difficult it is to deliver high quality service by our neutrals. For example, we are not sure how demanding the criteria for service needs to be, what training is essential, or how much monitoring is required.

It follows that one of the great empirical challenges we face is to develop ways to determine how much of a decline in quality, if any, is likely to accompany various degrees of expansion of the volume of cases a program serves. The difficulty of this kind of empirical inquiry is compounded by the likelihood that there will not be one uniform answer to this question that cuts across all court and program lines. Rather, the answer seems likely to depend on a host of variables, including, among others, the particular ADR process involved, the kinds of people who serve as the neutrals, the roles the neutrals are asked to play, the nature of the cases being served, whether parties usually are represented by counsel or represent themselves, the level of training, and administrative resources available.

I turn now to the challenge of trying to define “high quality performance” by an ADR neutral and to defending the notion that assuring that quality is

very important. What are the criteria by which we should define "high quality performance" in these settings?

There are two different "spheres of reference" from which we could reason in trying to respond to this question. One is very broad. In this broader sphere, the values or concerns around which the debate revolves focus on the ultimate purposes of mediation<sup>9</sup>—as a distinctive process and form of human interaction. The policymakers ask, in this larger sphere, what the primary mission of mediation is and what larger philosophy guides it. The second sphere of reference is smaller—but hardly unimportant. People working within this sphere acknowledge that there are broader questions, and that how policymakers answer those questions can play a major role in developing some of the criteria by which "quality" is defined. But the focus within this second sphere is on one core fact: that the ADR programs we are discussing are sponsored by our public courts. Because of that core fact, I contend, there is an irreducible group of characteristics of ADR processes and neutrals that must be components of any broader set of criteria by which "quality" might be defined. Before turning to the second, smaller sphere of reference, I should describe briefly the kinds of matters that policymakers might debate in the larger sphere.

As I said, the questions in this larger sphere are about ultimate purposes—of mediation as a distinctive process (independent of the setting in which it is being used). For some people, these are easy, almost self-answering questions. They believe that the "ultimate" purpose of mediation is simply to get more disputes settled, or settled sooner.<sup>10</sup> Other people have substantially greater

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<sup>9</sup> I focus in this paragraph on mediation, rather than ADR more generally, because mediation appears to be the most widely used ADR process and because there is far more writing about purposes and processes with respect to mediation than with respect to any other ADR mechanism.

<sup>10</sup> For a sense of the spirit associated with these views, see for example Kenneth R. Feinberg, *A Procedure for the Voluntary Mediation of Disputes*, in RISK ASSESSMENT AND RISK MANAGEMENT IN ENVIRONMENTAL LAW 179 (ALI-ABA Course of Study Materials No. SD37, 1998); Kenneth R. Feinberg, *Creative Use of ADR: The Court Appointed Special Settlement Master*, 59 ALB. L. REV. 881 (1996); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986). For descriptions of ranges of roles and styles of mediators, see Anthony T. Accetta, *Mediators as Problem Solvers*, 23 COLO. LAW. 561 (1994); Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediation Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885 (1997); Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703 (1997); Leonard L. Riskin, *Understanding Mediators'*

ambitions for mediation. Some contend that its primary purpose is to enhance understanding—by each party of its own situation and the situation of the other parties. Others believe that the primary goal is to increase the parties' involvement in, power over, and sense of responsibility for the resolution of their problems. The phrase "party self-determination" is used in some quarters to capture the spirit of these kinds of purposes.<sup>11</sup> Still other participants in the "mediation movement" have even more ambitious goals. They contend that the ultimate goal is not simply to improve party understanding and involvement, but to encourage parties to elevate the needs and feelings of others to a place of at least parity with (and sometimes ascendance over) their own needs and feelings. In this school of thought, the ultimate purpose of mediation is to encourage individuals to transcend themselves—to deepen their concern about others and to intensify their sense of social connection.<sup>12</sup>

What is deemed a high quality performance by a mediator might well be quite different in a program whose dominant goal is to increase the incidence (or to accelerate the timing) of settlement than in a program whose dominant goal is to teach parties new ways of interacting with others and to encourage them to attend more to the needs of others than to their own concerns. In mediations with the latter purpose, a neutral is likely to be deemed to have "performed well" only if she limits her role to certain fundamentals of facilitation and only if she steadfastly encourages the parties to look back to themselves, and to the dynamic between them, to find their own routes to connection and solution. On the other hand, in mediations where maximizing the likelihood of settlement is the main chance, the neutral will be deemed to

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*Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996).

<sup>11</sup> See, e.g., GA. ALTERNATIVE DISP. RESOL. R. app. C, § I ("[S]elf-determination of the parties is the most critical principle underlying the mediation process. Control of the outcome by the parties is the source of the power of the mediation process. Further, it is the characteristic which may lead to an outcome superior to an adjudicated outcome."); see also FLA. R. CERTIFIED & CT.-APPOINTED MEDIATORS 10.023 (Final Proposed Draft Aug. 1998) (circulated for public comment by the Office of the State Courts Administrator in Tallahassee, Florida in August 1998 and contemplated for action by the Supreme Court of Florida in February 1999).

<sup>12</sup> See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989); Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996).

have “performed well” if she is clever enough to have played whatever roles were required to lead the parties to an agreement. Often that means playing multiple roles over the course of the mediation—shaping her behavior to meet changing circumstances—engaging in a range of conduct that reaches from passivity to strong intervention. But those who believe that the main chance is simply getting the cases settled are far more likely to endorse assertive, even aggressive behavior by neutrals than those who believe that mediation must serve “larger” philosophic or societal purposes.

Lack of consensus about what the primary purposes of mediation should be spawns lack of consensus about what the fundamental character of the mediation process should consist of and what role the mediator should play. Should mediation be strictly limited to facilitative processes? Should it include the provision (by the neutral) of any kind of information? Should it include any analytical, evaluative, or predictive inputs by the mediator? Does a mediator have some responsibility to compensate for substantial imbalances (intellectual, informational, emotional) in bargaining ability or power? Does a mediator have some responsibility to assure that agreements reached are not clearly unfair, or are likely to be honored, or are not illegal?

What attributes would be required of a high quality neutral obviously can vary with the answers to these important policy questions. For example, in an ADR program that is designed to include evaluative inputs about the merits of claims, a high quality neutral would need to have analytical acumen and substantive knowledge. In programs that prohibit or discourage evaluative inputs by neutrals, on the other hand, it is not clear that these attributes would be deemed important to the provision of quality service.

It is not clear that in our democratic society it is the courts that should provide the answers to the questions about ultimate purposes that are debated in this larger sphere of reference. Those answers are probably most appropriately provided by legislative bodies. It follows that, absent clear directives from the legislative branch, there are real limits on the kinds of objectives that court-sponsored ADR programs can legitimately pursue—and that it is not the courts’ place to decide whether their programs should be used to promote larger societal objectives like reorienting people’s attitudes toward one another.

This does not mean, however, that the goals or purposes of court-sponsored ADR programs must be narrow or unimportant. The goal of an ADR program that is sponsored by a public court cannot be simply to have the disputing be over. The business of the courts is not business—it is justice. And the dimension of justice for which courts are primarily responsible is process fairness—which includes, among many other things, assuring that all people

stand equal before the law and are greeted by the judicial system with the same presumption of respect. It follows that the primary concern of any court that sponsors an ADR program must be with the process fairness of the services that are provided in that court's name. Those processes must be fully respect-worthy.

Thus, when we shift focus to the second sphere of reference, the sphere that is defined by the fact that it is the public courts that are sponsoring these programs, there is a clear basis for the courts to insist that the services provided by the neutrals meet some essential criteria. So the fact that a public court is the sponsor of an ADR program necessarily makes some values essential parts, at least, of the criteria that identify high quality performance—regardless of which of the larger purposes any given ADR program is designed to promote.

A mediator who works in a court-sponsored program will be viewed by the parties and their lawyers, at least in some measure,<sup>13</sup> as an agent of the court. A mediator who is so viewed must act in ways that conform to the most fundamental norms by which our judicial institutions are guided. As public institutions whose mission revolves around notions of justice, we can insist that quality in our ADR programs include, at a minimum, neutrals and processes that are dominated by moral integrity and that reflect a deep commitment to procedural fairness. Thus, a high quality neutral must have the ability to determine when that procedural fairness is in serious jeopardy and to respond appropriately.

Because she is likely to be perceived as a representative of the court, a mediator must behave in ways that will foster respect for judicial institutions. She must be able to sustain in a variety of trying circumstances both intellectual and emotional discipline over her own words and behavior,<sup>14</sup> and she must be able and willing to follow carefully, when expected to do so, prescribed sets of procedural protocols.

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<sup>13</sup> Many variables could affect the extent to which the parties view their ADR neutral as an "agent of the court." One of those variables, as I discuss later in this Essay, is the particular model for delivering ADR services that the court has adopted.

<sup>14</sup> Among other attributes, a good neutral must be able to respond appropriately to inappropriate behavior by others (e.g., to unchecked outbursts of anger, threats, or crude attempts to dominate or manipulate others). A good neutral develops techniques for responding to behavioral excesses in ways that will preserve the civility and integrity of the ADR process without needlessly humiliating the misbehaving lawyer or party or destroying any possibility of the ADR process yielding benefits.

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More specifically, a mediator in a court-sponsored program should not be considered to have rendered high quality service unless she has remained respectful of others and has strived to have others interact respectfully with one another. She must have listened to everyone with the same open and unbiased mind. She must have brought both intelligence and sensitivity to her role—she must have thought clearly, been alert to subtleties (of communication and of analysis), and been aware of and appropriately responsive to people's feelings. She must have been able to put herself in others' places—to view the world through eyes other than her own. She must have both felt and projected a strong desire to help others, and she must have brought considerable energy and commitment to her work. She must have been scrupulously honest, and must not have resorted to emotional, informational, or intellectual manipulation for any purpose (disclosed or ulterior).

Thus, at its core, the concept of quality that emerges from the smaller of our two spheres of reference focuses largely on the character of the dynamic between the neutral and the parties, and on the ability of the neutral to lead the parties to interact with one another in ways that are fundamentally respectable.<sup>15</sup>

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<sup>15</sup> I appreciate that the way I have defined the core attributes of high quality performance by a neutral glosses over some difficult issues. This fact is well illustrated by the requirement that the neutral proceed with great "moral integrity." To me, that clearly means at a minimum that the neutral cannot lie to, deceive, or manipulate any party. But the requirement of moral integrity does not necessarily dictate clear answers to other, more subtle questions. For example, what is the neutral to do when one of the parties appears to be trying to manipulate the other party? Is the neutral responsible for assuring that all participants in the process are "honest"? Does honesty by a party mean simply not lying, or does it also mean taking affirmative steps to provide all information that is foreseeably relevant to an informed decision by the other party? Does the requirement that the neutral proceed with high moral integrity mean that the neutral must offer information (e.g., about the law) that he or she believes a party needs in order to make an informed decision, or that the neutral should discourage a party from accepting a settlement that the neutral believes is unfair or unwise? How these difficult questions are answered can depend on the underlying purposes and philosophy of a given ADR or mediation program, as well as on the role that the court leads the parties to believe the neutral will be playing. It is conceivable that, in different program settings, the requirement of high moral integrity could be met even though these kinds of questions are answered differently.

### B. *Does the Quality of the Neutrals' Work Matter?*

I turn next to defense of the notion that high quality performance by the neutral matters. There undoubtedly are people who would argue that my concern about the quality of the neutral and of the mediation procedure is precious, and that court programs contribute most to resolving disputes simply by providing a settlement event, independent of its quality. What matters most, under this view, is the occurrence of the mediation, not how well it is handled. The central task, it is argued, is to get the parties to the mediation and get them talking. Having done that, the rest of the event will take care of itself. It is the crucible effect, in this view, and only the crucible effect, that really matters.

This position could have two different kinds of underpinnings: one empirical, the other philosophic. As I will discuss later in this section, some empirical work has been done that sheds some light on this matter.<sup>16</sup> That work is far from conclusive, however, so I hope that the studies that follow this Essay will include a substantial effort to assess empirically the notion that just having an ADR event is appreciably more important than its particular character or the quality of the performance by the neutral. We certainly need more real-world information in this arena.

But before we set out to gather that information, we must try to appreciate how the philosophic dimensions of the debate could affect what kinds of empirical information we look for. Specifically, we must acknowledge that there are a number of different and sometimes conflicting values and interests by which the "success" or "quality" of any given ADR program could be measured. Among these, settlement rates may be the most obvious, but they are not obviously the most important. Nor is any set of "efficiency" values, no matter how broadly cast (e.g., in terms of time, cost, or permanence of disposition). Instead, we should at least seriously consider whether measurement of the success or value or quality of court-sponsored programs also should take into account a host of additional values.

As a first step in these explorations, let us examine some of the possible philosophic underpinnings of the view that an ADR program will contribute most to dispute resolution simply by providing a settlement event, independent of its quality, or at least independent of the quality of the performance by the neutral host. We cannot simply dismiss this view—in part because it is supported by some challenging assumptions and some respect-worthy values.

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<sup>16</sup> See *infra* note 21.



Among those, one of the most intriguing is the suggestion that my insistence on the importance of quality in the neutral and quality in the process is fundamentally antidemocratic. It could be argued that the distribution of the traits of personality and the attributes of mind that are necessary to make negotiated dispositions likely, and to make the process that produces those dispositions fair and humane, is much broader than my concern about the quality of performance by the neutrals would imply. The contention would be that the social and intellectual skills that are essential to good mediations are widely distributed among potential neutrals, among the representatives of disputants (primarily lawyers), and among the disputants themselves. Proponents of this competing view would say that because they are prepared to place much greater confidence in the parties and their counsel, they need not worry so much about what skills and attributes the neutrals bring to the process.

A second, related set of assumptions supports this view. These begin with the notion that, to be successful, the negotiation process need not be all that subtly conducted. Instead, my challengers would contend, the process can and should be simple, direct, and straightforward. The need for process sophistication, they would argue, also is an elitist concoction, a figment of the self-serving imagination of people who want to be paid several hundred dollars an hour to serve as neutrals. In the vast majority of cases, this theory would go, the disputants (or their lawyers) will listen to and understand one another to the extent necessary, will not engage in behavior that destroys the opportunity to exchange positions, will locate underlying interests as necessary (which, they would argue, is appreciably less often than is fashionable in ADR circles to assume), and, when the thin procedural dust settles, will reach an agreement. Stated differently, the contention is that the ways litigants and the neutral behave during a mediation carry much less risk of harm to the prospects for success than the process purists would lead the policymakers to believe. Thus, the role of the ADR program is to get the parties together, and the role of the neutral is to keep them talking. Aided to this limited extent, they will solve their own problems.

I hasten to add that we must be careful not to blur the views just described with some of the broader schools of thought about the ultimate purposes of mediation. As noted earlier in this Essay, some influential mediation theorists subscribe to the view that the ultimate purpose of this process is to enhance party self-determination, while others suggest that the ultimate goal is transformation—of individuals and of their orientation toward and sense of

connection with other people.<sup>17</sup> These related but distinguishable views have deeply democratic roots—both hold that the mediation process should revolve around the parties themselves, encouraging their empowerment and their enlightenment (helping each participant increase her ability to hear and to understand both herself and others).

It does not follow from views such as these, however, that mediation is easy—or that it can be constructively handled by anyone with a modicum of gray matter. To the contrary, at least some proponents of the views described in the preceding paragraph are likely to place great emphasis on the need for extensive training for prospective mediators—in part because these theorists believe that to be a “good” mediator most people must “unlearn” deeply ingrained instincts about problem solving, as well as entrenched patterns of verbal behavior (instincts and behaviors that jeopardize attainment of the ultimate purposes of mediation).<sup>18</sup> Thus, to be an effective neutral within these philosophic frameworks requires the exercise of considerable discipline and skill, along with a substantial reorientation of impulses. True to their democratic roots, proponents of these theories probably would contend that the potential to become a good mediator is widespread—but they would concede that converting that potential to reality requires considerable effort.

But one need not subscribe to any particular view about the ultimate purposes of mediation to be persuaded that it is extremely important, in a court-sponsored ADR program, that the neutrals bring to their work both process sophistication and attributes of character of the highest order. The thoughts that follow support my view that courts should be reluctant to accept, at least until empirically supported, the notion that the occurrence of the ADR event is likely to be more important than its quality.

We must begin by focusing on the universe of matters that a court-sponsored ADR program will serve. Court programs service a small subset of the disputes that arise in our society. They are disputes that have survived to become “cases”—matters sufficiently intractable to drive someone to launch “litigation” (a notoriously unfriendly and burdensome process). Moreover, most court programs service only a subset of filed cases—a subset of matters that have survived for at least a few months on the docket.<sup>19</sup> So this is a

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<sup>17</sup> See sources cited *supra* note 12.

<sup>18</sup> See, e.g., Folger & Bush, *supra* note 12.

<sup>19</sup> There may be a few court-connected ADR programs that attempt to deliver services to disputes that have not “ripened” into filed cases. And there are some programs that offer mediation very early in the pretrial period, before the judiciary has any contact with the case at all. But such early interventions are the exception, not the rule. In most of the court-

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universe of disputes that the parties did not settle before litigation was launched and did not settle in the first few months after the complaint was filed. The latter point takes on added significance when we note that at least in federal courts somewhere between thirty and fifty-five percent of the civil cases leave the docket *before* the court devotes any significant attention to them—and often within about 120 days of filing.<sup>20</sup> For many of the cases that self-dispose within the first few months, it appears that the act of filing gets the requisite parties' (or adjusters') attention and galvanizes settlement energies.

All of this winnowing means that the cases that survive to a point where they need the services of a court's ADR program are not representative of disputes generally in our society. Instead, they represent a distinct minority—a minority composed entirely of matters the parties have not been able to resolve on their own. To assume that a substantial percentage of the litigants in this narrower group might need (and welcome) some help resolving their differences is neither insulting (to disputants who were able to resolve their problems on their own or to anyone else) nor unfounded.

We turn next to the assertion that there is relatively little risk of harm to prospects for success in the way the parties handle themselves in the mediation and in the way the neutral performs. We respond at two levels: first by questioning the real-world accuracy of the assertion, then by suggesting that the definition of "success" in this assertion is far too narrow, at least for programs sponsored by public institutions committed to pursuing justice.

Is it true that how the mediation process is handled (by the parties and the neutral) has little impact on prospects for success (however measured)? I am fairly certain that this is a question in want of an empirically reliable answer. I also would not be surprised if the answer varies with the circumstances (e.g., with the kinds of cases being served in the ADR program and with the role played in the ADR process by lawyers or other professionals representing the

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connected programs I know about, the first ADR session does not occur until after the case has been on file for at least several months.

<sup>20</sup> Developing reliable findings about this matter is difficult from nationally maintained statistics—but it is clear even from those statistics that about 20% of all civil cases will remove themselves from the dockets of federal district courts "without court action." It also is clear that an additional significant percentage of cases are resolved sometime "before pretrial"—so that less than 15% survive to the pretrial conference. A much smaller percentage actually goes to trial. It also is important to bear in mind that these percentages can vary substantially between different categories of cases. See L. R. MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR tpls. C-4, C-4A, C-5 (1997) (Report of the Director of the Administrative Office of the United States).

parties). But there is some data from previously conducted studies that suggests that the level of satisfaction among participants with an ADR event, and the likelihood that it will be productive, might depend more on the character and skill of the neutral (on the quality of the service the neutral provided) than on any other single factor.

Two independent studies of ADR programs in the United States District Court for the Northern District of California support this view. The first of these studies embraced about one thousand cases that were assigned to the ENE program between 1988 and 1992. After analyzing survey responses from large numbers of lawyers and litigants, the scholars who conducted this study concluded that "the most significant factors [affecting the likelihood of a successful ENE session] are the personal characteristics of the evaluator and the extent to which the evaluator follows the proposed procedure for conducting an ENE session."<sup>21</sup> More pointedly, the researchers concluded that "the individual evaluator's personal skills, attitudes, and behavior were by far the most significant determinants of participant satisfaction with ENE."<sup>22</sup>

Just one of several bases for these findings was the fact that "[a]cross all suit categories and within each class, the cases in which the highest-ranked evaluators participated closed substantially earlier than those cases assigned to evaluators ranked in the middle or bottom third."<sup>23</sup> For example, "the identity of the evaluator was a significantly more important factor than the nature of suit in influencing the pendency time of a [sic] ENE case."<sup>24</sup> The authors also found a strong correlation between attorney satisfaction with ENE and their perception that the individual evaluator had prepared well for the session.<sup>25</sup>

The second major study of lawyer and litigant views of ADR programs in the Northern District was undertaken by the Federal Judicial Center and was completed in early 1997.<sup>26</sup> This more recent study included not only cases participating in ENE, but also cases that had a mediation or a judicially-hosted

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<sup>21</sup> Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1515 (1994).

<sup>22</sup> *Id.* at 1529.

<sup>23</sup> *Id.* at 1510.

<sup>24</sup> *Id.* at 1532.

<sup>25</sup> *See id.* at 1523-1534.

<sup>26</sup> *See* STIENSTRA ET AL., *supra* note 6, at 173.

settlement conference.<sup>27</sup> After examining their survey data from multiple perspectives, the Center's scholars found:

On every measure we have examined . . . attorneys' responses varied by the quality of the neutral who conducted the ADR session. . . . Attorneys who ranked the neutral near or at the excellent end of the scale were significantly more likely to report that the ADR process reduced litigation cost and time, that their case settled through the ADR process, that the outcome was satisfactory and the process fair, that the benefits of using ADR outweighed the costs, and that they would volunteer a case for this form of ADR [in the future].<sup>28</sup>

In sharp contrast, attorneys who gave their neutral a negative rating were more likely to give the ADR process in which they participated negative marks in most or all of these respects.<sup>29</sup> As the authors of this study pointed out, "[t]he number of attorneys reporting an ineffective neutral was fairly small—twenty-three out of 226 giving a negative rating and thirty-six giving a middling rating—but their responses reveal that the impact of a poor neutral is wide-ranging."<sup>30</sup>

The thrust of these findings was not limited to the Northern California program. In the two other jurisdictions whose ADR programs the Federal Judicial Center studied under the mandate of the Civil Justice Reform Act of 1990 (Western Missouri and Northern West Virginia), the lawyers whose opinions were surveyed similarly reported that the quality of the neutral "was an important factor in the effectiveness of the ADR process."<sup>31</sup> Less

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<sup>27</sup> The study also included a few cases that participated in the court's nonbinding arbitration program—but these represented only a tiny fraction of the total, so had little bearing on overall assessments. *See id.* at 197.

<sup>28</sup> *Id.* at 207–208; *see also id.* at 21, 174, 193.

<sup>29</sup> *See id.* at 208.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 21. The lawyers were "particularly emphatic" about the importance of the quality of the neutral in the survey responses in the Western District of Missouri—but in assessing the significance of this data we must bear in mind that one person, an experienced civil litigator who was employed full-time by the court, provided the neutral services in the vast majority of the cases that the Federal Judicial Center's study reached.

RAND released its study of ADR programs in six federal district courts (by CJRA mandate, different courts than those studied by the Federal Judicial Center) at about the same time the Federal Judicial Center made its Report to the Judicial Conference, but the RAND study did not squarely assess the impact of the quality of the neutral's performance.

substantial support for the same inference has been offered by other studies and commentary.<sup>32</sup>

As impressive as the work just described has been, it is in no sense definitive. For the most part, it relies on reported perceptions, and the size and diversity of the study samples are limited. To date, we have no major study that focuses on the importance of quality performance by the neutral in mediation (as opposed to ENE or programs that include several ADR processes), and we have no systematic empirical studies that would equip us to determine whether the importance of the quality of the neutral's

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See JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 29-51 (1996).

<sup>32</sup> See, e.g., KARL SCHULTZ, FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT 17-18 (1990); Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 37, 39-40 n.7 (1996); Joseph P. Tomain & Jo Anne Lutz, *A Model for Court-Annexed Mediation*, 5 OHIO ST. J. ON DISP. RESOL. 1, 16-17 (1989) (noting that failure to achieve settlement was far more often attributed to intransigence by a party than to any aspect of the neutral's performance); Shaw, Selection, Training, and Qualification of Neutrals 1 (Oct. 15-16, 1993) (working paper for the National Symposium on Court Connected Dispute Resolution Research sponsored by the State Justice Institute and the National Center for State Courts); Roselle L. Wissler, Evaluation of Settlement Week Mediation 18 (Oct. 1997) (unpublished paper prepared for the Supreme Court of Ohio Committee on Dispute Resolution, on file with the *Ohio State Journal on Dispute Resolution*) [hereinafter Wissler, Evaluation of Settlement Week Mediation] (finding that attorneys were likely to rate neutrals who had mediated 15 or more cases as more effective than neutrals with less experience); Wissler, *supra*, at v (finding that "[a]ttorneys rated mediators with substantive expertise as being more effective, even though expertise did not increase the likelihood of settlement"); Roselle L. Wissler, Evaluation of the Pilot Mediation Program in Clinton and Stark Counties, August 1996 Through March 1997, at 3-4, 17, 20, 22-23 (Sept. 1997) (unpublished paper prepared for the Supreme Court of Ohio) (finding that if the mediator had prior experience litigating the kind of case that was the subject of the mediation, the attorneys were more likely to rate the mediator as effective, and the clients were more likely to believe that the mediator understood their positions); see also David A. Dilts & Lawrence J. Haber, *The Mediation of Contract Disputes in the Iowa Public Sector*, 18 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 145, 149-150 (1989) (noting an inability to determine whether differences in settlement rates were attributable to differences in ADR techniques used or to differences in mediators' skills, training, and experience, but noting that neutrals with deeper experience enjoyed somewhat higher success rates than neutrals with less experience).

performance varies with the kinds of cases served<sup>33</sup> or with other important factors.

While we await more thorough empirical exploration of these questions, we are constrained to rely in substantial measure on judgment and on prioritizing values. Stated differently, we must make educated guesses about how litigants are likely to behave in these settings, and we must decide which values we are least willing to risk when we make program design decisions based on those guesses.

Based on many years of experience hosting settlement conferences, my educated guessing greets with a fair amount of skepticism the notion that, for the universe of hardy disputes that become cases that survive well into the pretrial period, the parties, without neutral assistance, regularly will be able to identify the kinds of behaviors and words that are likely to be counterproductive or to provoke charged negative responses, then to discipline themselves to steer their interactive style away from those danger zones, to really listen to and understand one another, to appreciate all the analytical angles from which the merits of the matter should be assessed, and to move beyond purely positional bargaining—to identify real underlying interests and to search creatively for ways to make those interests complimentary. To expect any person to proceed in any setting in this way is to expect a lot; to expect most parties and lawyers who have formalized their disputes into costly litigation to behave this way, unaided, strikes me as unrealistic.

In my experience, parties to the hardy disputes that come before me in settlement conferences often are either unable or disinclined to interact with the opposing side in the manner that is necessary to maximize both the quality of the dynamic and its prospects for contributing to a positive, consensual disposition of the case. Without the guidance of the neutral, their behaviors are likely to fall far short of the optimum model. This is not to say that they are not likely, eventually, to settle their case. Most probably will. But it is to say that it is only with the active assistance of the neutral that the quality of the dynamic between the parties becomes fully respect-worthy—so that dynamic, by itself, becomes a thing of value (as well as a force leading, perhaps sooner than otherwise might be expected, to positive real-world results).

These notions—that the process should be fully respect-worthy and should be something of value in itself—are the centerpieces of my contention that

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<sup>33</sup> It would not be wise simply to assume, for example, that the importance of the quality of the neutral's performance is the same in family law matters and in commercial litigation—or that what constitutes a high quality performance is the same in both settings—even if the courts expected the neutrals to play essentially the same role in all the cases.

courts which sponsor ADR processes should resolve program design issues in favor of maximizing the likelihood that the neutrals will be of the highest character and that the services they provide will be of the highest quality. An ADR program that delivers less jeopardizes public confidence in and respect for the courts. In sharp contrast, an ADR program that provides only high quality service by neutrals increases the public's confidence in and respect for our system of justice and, by giving the parties a service they really value, increases their sense of gratitude toward the government and their sense of connection to our society. The more respect for and gratitude toward the courts the people feel, the more likely they are to respect the whole notion of law, to feel the importance and to acknowledge the legitimacy of having democratically developed norms govern relations within our country.

We can approach this same conclusion from a slightly different vantage point. Courts are charged with performing what is probably the most important function of government: peacefully resolving disputes and thus giving order and stability to relationships that do not order and stabilize themselves. Courts cannot perform this essential function unless the vast majority of people in our society will comply peacefully with the courts' decisions. Over time, in a democracy, the people will comply only if they trust and respect the courts as institutions. It follows that we must take great care to do nothing that jeopardizes that trust and respect. This is the main chance. So when we design court-sponsored ADR programs our greatest concern should be to preserve, at least, and to increase, if possible, the people's respect for, confidence in, and gratitude toward our system of justice.

There is a risk that this view will be perceived as driven by institutional selfishness and narcissism. As I hope other parts of this Essay make clear, my interest is not in the courts per se, but in the much larger goal of promoting a healthy social fabric by having the courts teach people ways of interacting, processes for addressing differences in their perceived views and interests, that have the effect of improving respect between individuals and increasing the sense of connectedness without which an aggregation of people cannot fairly be considered a society.

It is for these reasons that when, in the pages that follow, I compare the various models for delivering ADR services, I will focus on the factors that I think are likely to affect most the public's trust in and respect for the ADR programs and the courts that sponsor them.



### III. THE CHARACTERISTICS OF ADR PROGRAMS THAT ARE LIKELY TO AFFECT MOST OF THE PUBLIC'S<sup>34</sup> TRUST AND RESPECT

What are the attributes of court-sponsored programs that are likely to be most important to encouraging public respect and trust?<sup>35</sup> Stated succinctly, the attributes are the following: the public's perception of the motives and purposes that inspire and drive the program, the extent to which fairness permeates it, and the quality of the work performed and the value of the service delivered by the neutrals.

As the pages that follow make clear, a considerable number of program variables can affect the public's perception in each of these areas—but I contend that the single factor of greatest significance is the quality of the neutrals. More than anything else, it is their integrity, their commitment, their sensitivity, their substantive knowledge, their process skill, their energy, and their performance that will determine the level of respect and trust that the program enjoys.

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<sup>34</sup> In considering these matters, we should bear in mind that the "public," for our purposes, is not a simple monolith of voters or litigants, but is comprised of several constituencies, not all of which will always have identically aligned interests and perspectives. The public to which we must attend includes the general population (people who are not involved in litigation, but who form impressions of the "system" and who might someday be involved in litigation), litigants (from one-timers to repeat institutional players), lawyers (from one-timers to repeat players), the persons who serve as the neutrals in the ADR programs, judges, professional court administrators, and legislators and other political leaders.

Our thinking about which models best promote public confidence may be more refined and reliable if we keep in mind that our public is made up of these various components—because some of the issues and concerns we will address are likely to be of greater moment to some of these constituencies than to others and because, for different reasons, a healthy program will need real support from all of these quarters. For example, a mediation program that does not enjoy the confidence of the judges is in trouble, especially if referrals to mediation are not mandated by administratively applied rule. And if litigants and lawyers (especially repeat players) do not respect and trust the program, they either will not participate at all, or will not bring the constructive attitude and level of preparation to the mediations that are necessary to make the sessions productive.

<sup>35</sup> "Respect" and "trust" may not always be coterminous here. For example, the public might respect the purposes that inspire a mediation program and appreciate the good will and good faith of the people who operate it, but not have confidence in (trust) the competence (skills) of the neutrals. Similarly, the public could understand that a program is well meaning but believe that the timing of the mediations makes them unproductive, or that the character of the services provided by the neutrals is insufficiently sophisticated or fails to meet the real needs of the parties.

### *A. Respect and Trust*

Public confidence in a program starts with public respect for the reasons the program exists. Most of the constituencies in our "public" are not likely to be enamored of a program whose primary perceived purpose is to reduce the amount of work judges or court administrators have to do. So we must be careful, when choosing among alternative models, to attend to their implications for perceptions of our motives. Do some models increase (more than others) the likelihood that important constituencies will conclude that the program reflects an abdication of the judicial function, or an unauthorized delegation of important parts of that function to persons not employed by and not accountable to the public, or that the real purpose of the program is simply to reduce docket pressures by erecting additional barriers (in cost and time) to getting a day in court? A program that is perceived to be inspired by institutional selfishness or laziness is likely to be greeted with something less than unbridled enthusiasm in most quarters.

In a similar vein, perceptions of why the neutrals are serving, of what their motives and incentives are, can affect public confidence in the program. Do different models invite different inferences about these matters? Are there significant differences between the models in the likelihood that participants in the ADR programs will infer that the neutrals are motivated by money, by a straightforward desire to perform a public service, or by ambition to serve some private social agenda (to promote values that have not been legislatively sanctioned)?

In this connection, we must examine the incentives that would surround the neutrals' work. For example, do some models create greater temptations for the neutrals to needlessly protract the ADR sessions (e.g., to increase the neutrals' fees) or (at the opposite end of the spectrum) to give the mediation assignment a kind of "quick and dirty" treatment that would invite disrespect? Do some models create greater risks than others that the neutrals will use (or be perceived as using) their participation in the program to build up their own private practices, to bulk up their resumes for some other purpose, or to curry favor with judges or court administrators?

There is a closely related set of considerations we also should bear in mind. We need to think about what the public currently believes the role of the courts should be in our society and about what we want the public to believe the role of the courts should be. Do different models for delivering ADR services send different messages about what the role of the courts in our society is and should be? Do different models encourage different perceptions about how the courts define their own mission—and about the scope and

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character of the services the courts believe they are responsible for providing? Are some models more likely than others to encourage the public to conclude that the courts define themselves essentially as service-oriented institutions, that courts consider it their job to meet the real range of dispute resolution needs of the full spectrum of disputants in our society, or that courts should be leaders and role models in fashioning more constructive, healthy ways to approach and resolve conflict?

Approaching these same questions from a different perspective, are some models more likely than others to encourage the perception that courts (and government, generally) are out of touch with the realities of many disputants' situations or with important dispute resolution developments in the private sector? Are some models more likely to invite an inference that the universe of problems to which courts remain relevant is shrinking—and that it is limited primarily to issues of moment to big business or to wealthy individuals? Are some models more likely than others to encourage the perception that the primary function of the courts is to lubricate the major cogs in the economic machine, that the business of American courts really is business, and big business, at that?

Generally, are some models more likely than others to enhance or to diminish the public's sense of the importance of courts, and of democratically generated law, in our society?

We also should consider what implications our choices among ADR models might have for the debate about what the relative roles of the public and private sectors should be in the provision of ADR services. Do we want our choice to signal that the provision of ADR services should be primarily by government, and by government directly? Do we want to signal that we believe that most ADR services should be provided by the private sector? Should we be concerned about whether our selection of a model reflects a vote of confidence in, or reservations about, the capacity of the private sector to deliver fair and reliable service in this arena? Do we want to signal that in the vast majority of cases the people should solve their own problems, without help funded by the taxpayers? Or, do we want the model we choose to indicate that we think the healthiest approach involves balanced cooperation and interdependence between the public and private sectors?

Additionally, we need to attend to the messages we send about the value of ADR and about the relative importance of the kinds of cases and litigants that the courts' ADR programs serve. Are some models more likely than others to encourage an inference that courts (and government) view ADR processes as inferior to traditional adversary litigation, as second rate means of dealing with disputes? If so, or for any other reason, are some models more

likely to lead the litigants who are ordered or urged to use ADR processes to conclude that the courts view these litigants, or the kinds of disputes they are involved in, as "second class"—as less deserving than other litigants or kinds of cases of the full commitment of judicial resources?

The support of important constituencies will be jeopardized if an ADR program appears to reflect a belief that some classes of cases or litigants are less worthy of the attention of the courts than others. If users believe that they and their class of case have been relegated to a second class system, or to an inferior tier in some governmentally imposed hierarchy, earning their respect and their full participation will be much more difficult. So we must consider the implications of our choice of models for how users (and others) perceive the quality of the service they receive. Are some models more likely than others to encourage a perception that the program represents a valuable *added* service, rather than a poor substitute for what would otherwise be perceived as the real thing?

Public confidence also will be a function of the level of assurance the public feels that the program in operation complies fully with the letter and spirit of the formal rules that govern it. A program whose actual operation varies appreciably from how it is described, formally, to the public, or that falls visibly short of promises made about it, will discourage respect for the institution that sponsors it and will invite inferences that the court really does not care much about the program and really does not respect its value. So when we compare programs, we should ask whether assuring real compliance with the rules that govern it, and real fulfillment of its promoted promise, is likely to be more difficult in some models than in others.

### *B. Fairness*

There is a tight interdependence between the public's perception of a program's motives and purposes and the public's perception of the program's fairness. In selecting among ADR program models, we must consider whether some models are appreciably more likely than others to generate a perception and a reality of fairness. To refine our thinking about this important issue, we must try to identify the variables (related to the choices among the models) that are most likely to have a substantial effect on perceptions of fairness. The thoughts that follow represent a start toward that goal.

Let us focus first on democratization of access. Do different models create economic, procedural, or sociological barriers to participation of appreciably different heights? In addition to differences in cost barriers, we should consider whether some models are more likely to produce apprehension,

intimidation, or distrust in potential users of ADR services, or to interpose bureaucratic hurdles. What are the magnitudes of the differences between the models in these arenas, and do all the differences cut in the same direction (or do some favor one model, while others favor a different model)?

Next, we must consider whether some models create greater risks than others that the mediators will be biased or perceived as biased. Freedom from even a hint of bias is so important both to public confidence and to the productivity of a mediation program that we must try not to overlook any aspect of a program that might serve as a source of concern (in the public) about the neutrality of the mediators. Thus, we must examine the impact of our choice of model on such variables as the qualifications and backgrounds of the neutrals, the composition of the corps or pool of neutrals, the process by which the neutrals are selected, the source of any funds used to compensate or reimburse them, the ties they retain after they begin serving, the other work or activities they engage in while they remain connected with the court's program, as well as the mechanisms for clearing for conflicts of interest, for training, for monitoring performance, and for responding to allegations of inappropriate conduct. We also must look at the neutrals' ties to the court, or to individual judges, and to the rules that govern their communication with the court.

Among the factors just listed, one warrants elaboration at this juncture. We should pay special attention to how our choice of model affects our capacity to develop a panel or pool of neutrals that contains the degree and kind of diversity that is appropriate to the particular ADR program we are implementing. Some models offer opportunities to develop pools of neutrals that are much larger and more diverse than can be developed under other models—and for some ADR programs, levels of public confidence, and perceptions of fairness, might depend substantially on achieving certain kinds of diversity or balance in the pool of neutrals.

Which elements of diversity are most important to perceptions of fairness might well vary from ADR program to ADR program. In some program settings, what might be most important is balance in professional background (e.g., between plaintiffs' and defense lawyers), while in other program settings the elements of needed diversity might be subject matter expertise, particular life experiences, or professional training (e.g., in some family law or juvenile court programs), race, national origin, gender, and sexual orientation. Program designers should try to develop a sense of whether—and to what extent—any particular kind of diversity or balance in the pool of neutrals is important to public confidence in the fairness of their ADR services. Because some kinds of diversity might not be achievable through

some models, these kinds of considerations could have a major impact on choice of model in a court that has concluded that achieving a certain kind of diversity is very important to securing public trust in that court's ADR program.

At this juncture we shift focus to a factor whose potential impact on perceptions of fairness in an ADR program might be less obvious: the roles the neutrals are asked to play. Are certain models more likely than others to push the neutrals to play more analytically active, evaluative, or directive roles? This question is relevant to public perception of the fairness of the proceedings for at least the following two reasons: (1) the risk that the neutral will make a substantive error (and, in that sense, be "unfair") increases with the extent to which the neutral feels constrained to make substantive inputs and (2) it is possible that the risk that the neutral will be perceived as biased increases with the extent to which the neutral makes evaluative inputs or directive suggestions.

This is another area in which we need much more empirical research. Is the more analytically assertive neutral more likely to be perceived as biased? Or does the level of risk of perception of bias depend *not* on *whether* the neutral is evaluative, but on the form, timing, or character of the neutral's evaluative inputs? Or does the level of risk of perception of bias increase only when the neutral suggests what the terms of settlement should be?<sup>36</sup> And how great are these increases in risk, if any? Are any such increases offset, in the minds of users of the ADR services, by perceived utility of evaluative inputs or directive suggestions?

A sense of unfairness also could be provoked in parties who believed they were being pressured to reach an agreement or to accept the neutral's views—so we need to determine whether different models are likely to generate different degrees of pressure on the neutrals to get cases settled, or to bend the rules or exceed their authority in order to claim some other kind of

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<sup>36</sup> There is some data from Ohio that suggests that the risk of perception of bias increases when the neutral recommends specific terms of a settlement, but not when the neutral just offers some analytical feedback. See Wissler, *Evaluation of Settlement Week Mediation*, *supra* note 32, at 30. On the other hand, parties to mediations in family court in Maine understood the mediators to be recommending particular settlement terms in about half the cases, but still rated the mediation process as fair and the neutrals as even-handed in well over 90% of the cases. See Market Decisions, Inc., "Trapping the Data": Mediation Programs in Maine 16-23 (Sept. 1997) (unpublished report about mediation in family court in Maine prepared for the Court Alternative Dispute Resolution Service (CADRES) of West Bath, Maine, on file with the *Ohio State Journal on Dispute Resolution*).

accomplishment. Stated more generally, we should look for pressures that might lead to distortions of appropriate roles by the neutrals.

Shifting focus to another fairness concern (of lesser apparent moment than those just mentioned), we also should ask whether different models create different levels of risk that lawyers who have served the court as mediators will be perceived as enjoying an unfair advantage over lawyers who have not so served. If the judges of a court know that certain lawyers or firms perform valued service for the court as mediators, other lawyers might be concerned that the judges would feel indebted to those mediator-lawyers (concerned that the judges would feel that they owe their mediators a favor). If those mediator-lawyers appear in other contested cases in front of the same judges, the parties who are represented by counsel who have not served the court might feel disadvantaged.

A more subtle variation on this theme can arise when the judges pick or approve or help train the lawyers who serve as their mediators. It might occur to parties whose opponent is represented by a lawyer who has served the court as a mediator that they are at a disadvantage not as a result of some sense of indebtedness by the court, but because the court might have greater confidence in the integrity, intelligence, or judgment of the lawyer whose ability the court already has endorsed (or whom the court has trained and certified to serve as a representative of the court in the mediation program).

### *C. The Quality of the Neutrals and the Service They Provide*

When we compare structural alternatives for delivering ADR services, we should attend with special care to the possibility that different models offer different degrees of assurance that the people who serve as the neutrals, and the service they actually provide, will be of the highest possible quality.

These are matters of both perception and reality. For example, we need to ask whether different models offer neutrals different degrees of presumptive status or respect in the eyes of the affected constituencies. A related inquiry would focus on whether there are differences between the models in the protections (legal, practical, or sociological) they offer to the neutrals from unfounded complaints or from lawsuits by disgruntled participants—there could be a relationship between the capacity of the program to attract and retain high quality neutrals and the level of protection the program offers to its mediators.

But there are other points of comparison that are likely to yield findings of greater significance to our concern about quality in the neutrals. As part of our larger inquiry, we must compare the different models' capacity for quality

control.<sup>37</sup> Do the different models pose different challenges to achieving quality control? Do the risks of quality control failures vary appreciably from model to model (e.g., is the risk greater, under some models, that the courts will lose touch with what is actually being done in the programs under their sponsorship)? Are the sources of risk to quality control different in the different models? Are there substantial differences between the models in the cost of achieving quality control?

More specifically, are there differences between the models in the quality of the people who can be recruited to serve as the mediators, or in the ability of the court to attract neutrals who have the needed subject matter expertise or the appropriate diversity of backgrounds and experience? Do some models offer greater ability to *retain* (over time) the services of high quality neutrals? Do some models offer significant advantages over others in training the neutrals? Is the angle of the neutrals' learning curve likely to be appreciably steeper<sup>38</sup> under some models than under others? Is any one model the most likely to yield performances by neutrals that are most skillful and sophisticated? Do some models promise advantages in monitoring and disciplining the neutrals' performances, in analyzing the effectiveness of their work, or in providing users of the system with opportunities to comment about and assess the way the neutrals function? Is recruiting, training, monitoring, or evaluating effectiveness likely to be appreciably more expensive under some models than under others?

We also must examine the likely effects of the different models on how well the neutrals perform. Do different models offer different levels of incentive for the neutrals to commit the time and energy to the ADR process that will be necessary to maximize its effectiveness? Is there a greater likelihood under some models than under others that the neutrals will be sufficiently patient and appropriately tenacious or that they will behave with appropriate levels of restraint and dignity? And, as asked in relation to perceptions of fairness, are some models more likely than others to generate role-distorting pressures on the neutrals?

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<sup>37</sup> "Quality control" includes, at least, systems to assure both (1) that the people who serve as the neutrals have the appropriate attributes (character, temperament, sensitivity, skill, experience, knowledge, energy, and tenacity) and (2) that when the neutrals actually perform, they discipline themselves to comply with both the letter and spirit of the program's rules.

<sup>38</sup> Another way to express this idea is to focus on the "compactness" of the neutrals' learning: how fast do they acquire the most important skills and sensitivities, and how well do they retain these skills and sensitivities from one mediation to the next?



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Using these questions and concerns to guide our comparison of the models should enable us to make more reliable judgments about which models (at least in specified settings<sup>39</sup>) are likely to generate the highest levels of public confidence and to provide the most valuable services to users of the ADR programs.

### IV. THE MODELS

We have been asked to compare the following five<sup>40</sup> “models” that courts might use for delivering ADR services.

#### A. *Full-Time In-House Neutrals*

In this model, the court hires and pays with public funds the people who serve as the mediators. The mediators are full-time employees of the court. Mediation services in the court’s program are not provided from any other source.

#### B. *Court Contracts with a Nonprofit Organization That Provides the Neutrals and Administers the Program*

This model could be implemented in either of two ways. Under one variation, the parties are charged either nothing or only a nominal fee for the services performed by the neutrals, and the neutrals either are not paid at all or are paid far below market rates with money that is provided by the court through the contract with the nonprofit organization. Under the other variation, the parties are charged more substantial fees (approaching market rates) for the neutral’s services—while neither the court nor the nonprofit

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<sup>39</sup> By “settings” I mean sets of program variables like the kinds of cases involved (e.g., subject matter, amount in controversy, numbers of parties), whether participation is mandatory or voluntary, and whether most participants are represented by lawyers during the mediation sessions. The outcome of our comparative analysis could vary with different sets of assumptions about these variables.

<sup>40</sup> Other commentators may describe the models somewhat differently and may identify six (or more) models for discussion. The models are conceptual constructs which we use primarily to explicate the issues we have been asked to address. They do not purport to exhaust the universe of possibilities or to reflect all the variations that have been adopted.

organization that orchestrates the service by the neutrals makes any significant contribution to the income received by the neutrals.

*C. Court Directly Pays Private Individuals or Firms to Serve as Neutrals*

Under this model, the contractual relationship that underlies provision of the neutral services is between the court and the neutral, not between the parties and the neutral. The court, not the parties, pays the neutral's fees. While the fees often are not as high as pure market rates would dictate (at least for some of the neutrals), they are not nominal and could constitute a significant portion of some neutrals' income. But the neutrals are not full-time employees of the court. In most courts that operate under this model, the fees are fixed on a per case basis, not per hour.

*D. Court Orchestrates Services by Private Individuals Who Serve as Neutrals Without Pay*

Under this model, the court recruits, trains, monitors, and disciplines the neutrals, who are private citizens who serve without pay and who generally devote only a small percentage of their work life to service in this capacity. Because the neutrals work on what is essentially a pro bono basis, there is little or no charge to the parties for participation in the ADR program.

*E. Court Refers Parties to Private Neutrals, Who Charge the Parties Market Rates for Their Services*

Under this model, there is no contractual or financial relationship between the neutrals and the court. The court might establish some minimum criteria for serving and might set up a clearing house list of people eligible to serve—but the court's involvement in quality control is either nonexistent or modest.

The principal variations of the model include the following: (1) the court ordering the parties to use a neutral that the court names; (2) the court ordering the parties to select a neutral from an approved list; (3) the court simply ordering the parties to go into the private market and find a neutral on their own; or (4) the court accepting a stipulation by the parties that they will participate with a neutral of their choice in an ADR session during a defined period—during which, usually, the court suspends the case development obligations the parties might otherwise have. Under all of the variations of this

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model, the parties end up paying, usually on a fifty-fifty basis, the market rate fees of the neutral. In some programs, if an impecunious party is ordered to participate in a mediation, either the neutral will waive her fee or the court will pay it.

These are by no means the only “models” that courts have adopted for providing ADR services. And some courts have developed hybrids of these approaches, taking some features from one model and other features from different models. It also is important to emphasize that no court need feel compelled to choose just one of these models: it might make sense, for example, to use one model for certain kinds of cases or in certain circumstances and to use another model for others.<sup>41</sup> To give focus to our exploration of the issues, however, and to permit readers to compare our views, we have been asked to direct our remarks to these five models.

In keeping with the central theme of this Essay, I organize the discussion that follows not around each model but around the values and concerns that I think we should attend to most when we decide how to structure court-sponsored ADR programs. Thus, each section focuses on a specific set of values—and explores how well or how poorly the various models serve, or how seriously they threaten, that set of values. To maintain some control over the length of this Essay, I will not discuss separately each of the five models with respect to every issue I raise—sometimes because the issue itself does not warrant the extended discussion, sometimes because it is not clear that there are substantial differences between some of the models with respect to the value or concern being discussed. What I have not done, in part because doing

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<sup>41</sup> It is not clear that it would be wise to adopt more than one service-delivery model for the same kinds of litigation or litigant—except, perhaps, as necessary to conduct fixed-term experiments. Adopting more than one model for one class of cases could impose substantial administrative burdens and would create considerable risk of administrative error. Moreover, using two different models for similarly situated parties or cases creates a risk that some litigants will feel that they are not being treated equally and are receiving an inferior class of service (causing them to devalue and not take full advantage of the ADR process itself).

This caution about using more than one service-delivery model for the same class of cases does not necessarily apply to *offering* more than one kind of ADR process to cases in the same class. It may make considerable sense to permit parties within categories of cases to select from a menu of ADR process options (e.g., early neutral evaluation, mediation, arbitration, nonbinding summary jury or bench trial, or judicially hosted settlement conferences). This approach has been well received in several jurisdictions (including the multidoor courthouse programs in the District of Columbia and in Oklahoma and the multi-option program in the United States District Court for the Northern District of California).

it would miss the main point and in part because it would require a book-length work, is to assess every implication, every possible pro and con, of each of the five models.

As I have worked my way through the comparisons I describe in the pages that follow, I have gravitated toward the feeling (not a firmly held conclusion) that, for my purposes, there is one structural factor that accounts for the most significant differences between the various systems for delivering ADR services. That factor is whether the neutrals are employees of the court (court staff) or not. Thus, much of the "comparing" in the remainder of this Essay ends up being between the staff-neutrals model, on the one hand, and, on the other, the models in which the neutrals are not employees of the court.<sup>42</sup>

## V. COMPARING THE MODELS: PUBLIC TRUST

### *A. Perceptions of the Court's Motives and Its Belief in the Value of ADR*

Earning the public's trust in an ADR program is a complex undertaking—dependent on a great many different factors. Some of these factors, like the capacity to assure that the neutrals follow prescribed procedural protocols, we will discuss in subsequent sections. In this section, we focus primarily on how different program structures might affect the public's perception of the motives that inspire the court's program; the public's perception of the motives of the people who serve as neutrals; and the messages the different structures are likely to send about how much the court values ADR, how the court defines itself as an institution, and what the court believes its role should be in our society.

At the outset we should make one important point clearly: perceptions of a court's motives can be substantially affected by perceptions about how much the court really values and respects the ADR process it sponsors. The more the structure of a court's program encourages users to believe that the court

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<sup>42</sup> For the purposes of this Essay, a "staff-neutral" is an employee of the court who commits all or a substantial percentage of her time to serving as a neutral in ADR processes. I do not include in my definition of staff-neutrals persons who are paid (even under some kind of contract) with public funds for performing neutral services on an hourly or per-case basis. Rather, a staff-neutral, for my purposes, is a person who is directly employed by the court and is paid a fixed salary that is independent of how many cases she serves or how many hours she devotes to ADR sessions.

believes in the program, the less likely users are to infer that institutionally selfish (or worse)<sup>43</sup> motives led the court to adopt the program.

One major factor that could affect the public's perception of the motives that underlie a court's ADR program, and how much the court values that program, is money. A court that visibly uses its own precious resources to pay the full cost of providing ADR services discourages the public from inferring that the purpose of the ADR program is simply to reduce demands for the court's services or to shunt work that the court should be doing off into the private sector. Thus, courts that bear the full cost of their ADR programs are less likely to encounter cynical inferences that what really inspires those programs is a desire to dump cases into a supplementary process that will make those cases go away.

Moreover, other things being equal (e.g., public pronouncements about purpose and ethical rules), the public is more likely to believe that a court really believes in a program if the court itself pays the full freight of that program—and uses significant amounts of money to support ADR that the court could use for other functions. By using its own money to pay for mediation services, for example, the court signals that it believes that those services represent real added value, not a poor substitute for more highly esteemed traditional litigation.

More broadly, by visibly paying for the ADR services in its program, a court most clearly indicates that it is assuming full responsibility for those services—that the court is openly tying its public image to the quality of those services, demonstrating that it has sufficient confidence in those services to risk its public ego in them. It is by willingness to take these kinds of ego-risks, and to commit real resources for which there is obvious competition, that a court most clearly endorses its programs—and reassures the public that they are in no sense “second class.”

From this perspective, the courts that use their own full-time employees to serve as the ADR neutrals inspire the greatest confidence that constructive public values drive the ADR program. Stated differently, the public is not likely to assume that a court would use its own money to provide directly in its own name services that it believes are inferior or “second class.” The next most attractive model, from this perspective, is the one in which the courts use their own money to pay the fees of private neutrals. In the latter model, however, the court's commitment of its own funds may be less visible.

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<sup>43</sup> Courts should be especially concerned if parties infer that ADR programs are inspired, in any measure, by judicial disdain for certain kinds of cases or disrespect for certain kinds of rights or litigants.

Moreover, because the rates paid to the neutrals usually are below market, the message of commitment sent by the financing of this model may be less clear. Nonetheless, the commitment of significant public resources gives this model a confidence-inspiring edge over models in which the courts commit relatively little, or none, of their own resources to provision of the ADR services. The models that fare least well with respect to this factor are the models in which the court merely sends the parties into the private market to arrange and pay for the services of a private neutral and the models in which the courts contract with another institution to provide the neutral services, but pay for little more than administrative overhead.

Of course, a court could make a substantial financial commitment to its ADR program without paying for the work the neutrals do. Some courts, for example, commit several professional staff positions to designing and running ambitious ADR programs—programs that serve so many cases that the staff could not possibly provide the neutral services in a significant percentage of referred matters. By making visible and substantial commitments of their own resources to these programs, such courts also demonstrate a real commitment to the value of ADR services—and thus discourage cynical inferences about the purposes of their programs. But the strength of that message may be greatest in courts that pay the full cost of the neutral services—and thus treat the provision of these alternative services as comparable in value to the traditional litigation services that the courts pay for in full.

There is another, related perspective from which to consider the role of money. When neutrals receive no compensation, or when they are paid at well below market rates, there may be a greater risk that the parties will devalue their services—and infer that the court does not really value those services or the program in which they are rendered. Courts can take steps to discourage such inferences—e.g., through public, vigorous, and repeated affirmations of their belief in the quality and value of the neutrals' work and through high-visibility demonstrations of gratitude to the neutrals for their service. It is difficult to sustain such public affirmations, however, and it is not clear that they carry the same "message-clout" that money carries. And demonstrations of gratitude by the court to neutrals, at least when they are also members of the bar, can cause collateral problems.<sup>44</sup>

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<sup>44</sup> When a court appears to feel indebted to a lawyer who served as a neutral, and that lawyer later appears before that court in other matters, there is a risk that opposing counsel or parties in those other matters will question the evenness of the playing field.

## COMPARING STRUCTURES FOR DELIVERY OF ADR SERVICES BY COURTS

All of these kinds of concerns about “money-messages” tend to commend the staff-neutral model and, to a somewhat lesser extent, the models in which the courts visibly pay for the services performed by the neutrals.

There are additional features of the model in which the neutral services are provided directly by court staff that militate against an inference that the court views its ADR program as providing a second class form of justice. The primary generalization here is this: the closer and more visible the connection between the court and its ADR program, the clearer the court’s signal that it identifies itself with that program—and endorses its value and quality. That crucial connection is diluted least in the staff-neutral model—where the people who serve as the neutrals are part of the court and most obviously identified by the parties with the court. In contrast, the institutional or professional connection between the court and the neutrals is thinnest when the court simply sends the parties into the private sector to find and pay their own neutral, or when the court presents the parties with a long list of neutrals in whose training and monitoring the court has been little involved.

Another factor that cuts in the same direction is the court’s capacity to maintain procedural track and time-control over the cases that participate in an ADR program. The risk is greatest that the court will lose procedural track of the cases, or that more time will be unjustifiably run off the pretrial clock by the ADR referral, under models in which the court sends the cases to outside ADR providers (individual or institutional). And the more control over its cases a court appears to be willing to give up, the more likely the public is to infer that the court does not really care about those cases—or cares less about them (thinks they are less important) than the cases over which the court insists on maintaining tight control (and to which the court provides directly, at its own full expense, all the traditional adjudicatory services).

A court has the ability to keep the administration of its ADR program under tightest rein under the staff-neutral model. Under this model, a court can exercise more control over the timing of the ADR sessions and can minimize the risk that the cases will float off into some procedural limbo for protracted periods.<sup>45</sup>

Generally, “sending” cases to outside providers increases the risk that the parties will feel that the court is sending them away—because they are not important or because the court does not want to be bothered by them.

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<sup>45</sup> Some ADR programs in Ohio courts report longer delays between the referral to mediation and the holding of the session when the neutral is drawn from a pool of private professionals than when the mediator is a full-time court employee. See Memorandum from C. Eileen Pruett, *supra* note 8, at 7.

Moreover, the risk that the parties will feel that the court is “sending them away” increases when the ADR session is not conducted in the courthouse—but in a conference room in a private office or in some other organization’s building. The physical act of being sent out of the courthouse to some other place can suggest second-class status—and that the court does not care much about or is not heavily involved in the events that take place outside its physical domain. Being sent away physically also can distend the sense of social and moral connection with the court system, and thus with the values and behaviors that the system symbolizes and demands. The farther the parties and the neutral are from the courthouse, physically, the farther they may be in spirit and conduct as well. In some ways or circumstances, that separation could be a positive development—if, for example, the spirit and conduct that the parties associate with the courthouse is rigidly formalistic, alienating, and verbally pugilistic. But to the extent that the parties associate the courthouse with expectations that they will be on their best behavior, that high moral standards will be used to guide and judge them, and that it is important to honor rules of law, separation from the courthouse could open the way to moral or behavioral lapses that would not occur inside the courthouse itself.

These negatives are least likely to surface under the staff-neutral model, because it is under this model that cases are least likely to be sent away, physically, from the courthouse for their ADR session. So this model creates the least risk of a physical suggestion that the court is trying to get rid of the cases it sends to ADR. The next best model, from this perspective, is one in which the court pays neutrals from the private sector to provide the ADR services—and encourages those outside providers to use courthouse facilities as much as possible.

#### *B. Inspiring Gratitude and a Sense That the Court Defines Itself as a Service Institution*

Surveys of litigants and lawyers in Ohio, and anecdotal experience in other jurisdictions, have suggested that courts that provide ADR services can earn something very important from parties: a sense of gratitude. When parties perceive that the court’s purpose in offering an ADR process is to *help* the parties, not to discourage them from consuming the court’s resources, they are grateful. The parties are especially likely to be grateful when they believe that the court is trying to identify the values and interests that the *parties* feel are important—and then is trying to offer to the parties services that are responsive to those party-defined values (as opposed to the court’s own values



or interests). For example, Ohio surveys showed that many litigants were grateful for the opportunity the court gave them to save their own money and time and to exchange views with opposing parties about the merits of the cases in settings that were less formal and less intimidating than in traditional litigation.<sup>46</sup>

A lawyer who provides mediation services for a federal appellate court provided me with another significant example. For years, a group of parents had been in litigation with local school authorities, pressing for changes in the educational system that the parents felt were extremely important. This struggle was taking place in a community of modest size, in a relatively remote region with little political clout, and the group of parents that had pushed the case through the system to a federal court of appeals was in the minority—effectively disenfranchised. They were deeply alienated. Then their case was designated for the mediation program in the court of appeals. That led, initially, to some phone conversations about procedures, positions, and interests, then a decision by the mediator to fly hundreds of miles to a location where all the parties could afford to convene for a mediation. The appellate court program paid for the flight—and for all of the work by the mediator (she was on the court's staff of professional mediators). The mediator devoted considerable time to the ADR process—but it did not resolve the litigation.

From some important perspectives, however, this mediation was very successful. The mediator spent a great deal of time with the parents, listening carefully to the history of their dynamic with the local authorities and community, and making sure that the parents understood that she, the mediator, had developed a comprehensive grasp of the character of their claims and the kind of changes they felt were necessary. The parents also developed confidence that through the mediator they were able to communicate accurately their feelings and views to the local authorities. When the defendants would not make sufficient concessions to satisfy the parents, they were disappointed. But they also were deeply grateful—not to the local board, but to the mediator and to the court of appeals for providing her services. After years of efforts at the local level and years of litigation, they felt that the mediator was the first person who was connected in any way with the power structure in our society who had really listened to them, the first person who visibly took seriously the need to hear and try to understand their grievances and their perception of their needs.

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<sup>46</sup> See Wissler, *Evaluation of the Pilot Mediation Program in Clinton and Stark Counties*, *supra* note 32, at 7–8.

This was extremely important to them because they were a minority and had felt powerless and alienated. In the mediator, they saw, for the first time, the "system" listening to them, caring about what they had experienced and what they thought, trying to be responsive. And the mediation itself was a process they could understand, in which they could participate, governed by rules and overseen by a person they respected. Moreover, through the mediator, the system had come to them—had flown hundreds of miles that they could not afford to travel in order to give them an opportunity to try to solve their problem. So even though the mediation did not yield the relief they wanted, they were moved by the concern and the sensitivity they felt from the mediator and by the generosity and outreach of the institution that sent her—the court.

That gratitude is important, without more. But there is more. When those parents felt heard and served by the court, through its mediator, they felt less alienated. They also felt respect for the process the court had provided—a process that did not inspire fear and distrust, but that, instead, they could see was designed to involve them directly and centrally in exploring their situation and expressing their views. Gratitude and respect led them to feel, certainly for the first time in relation to this dispute (about which they cared so much), some sense of connection to at least one important part of the institutional framework of our society—the court. Gratitude, respect, connection—these are the main chance.

It also is important to emphasize that by taking the initiative and providing the mediation service as it did, the court showed these parties by its own actions (speaking louder than words) that it defines itself as a service institution—that it believes that its mission is to help people resolve their differences and to provide them with processes for doing so that are worthy of respect (fair and sensitive) and that they can use without excessive stress (economic or emotional).

The model for delivering ADR services that contributes the most to these important values is the staff-neutral model. This model is most likely to inspire a sense of gratitude to the court because it is clearer under this model than under any other that it is the court that is the source of the service. Moreover, it is in this model that the court itself most clearly acknowledges that its traditional litigation procedures can be alienating, intimidating, stressful, expensive, and slow—and that it is an essential part of the *court's* responsibility to make available procedures for resolving disputes that provide litigants an opportunity to avoid these aspects of the traditional approach. The feeling of gratitude is likely to be greatest when the parties see that the court understands its own limitations and is trying to add services which, in some

circumstances, better fit the needs of the disputants. A court whose own staff professionals provide the ADR services sends these messages most clearly.

Among the models we are considering here, the two that probably deliver the least to these important values are those in which the court contracts with an outside institution, which then administers the program and delivers the ADR services, and those in which the court orders the parties to find their own neutral (in the private sector) and to pay her fee. In these models, the court is not providing the services directly and is not involved much in helping the parties—so there is much less occasion to feel gratitude to the court and much greater risk that the parties will believe that the court has sent them into the Siberia of dispute resolution.

### *C. Perceptions of the Motives of the Neutrals and Presumptive Levels of Respect*

The model in which the ADR services are provided directly by professionals who are employed full time by the court also seems to generate the least risk that the public will have confidence-challenging questions about the motives of the people who serve as the neutrals. Unlike models in which the neutrals are from the private sector and earn roughly market-rate fees, staff-neutrals are not likely to inspire concern that they are in it for the money. The salaries for such positions are not likely to be high, and parties will understand that neutrals who are court employees have no incentive to prolong mediation sessions in order to increase their compensation—a concern that could undermine confidence in the mediator's motives when the parties are required to pay market rates.

Moreover, if the neutrals are full-time employees of the court, and if they are prohibited from having a private mediation practice, there will be no occasion to worry that what is driving their service is an effort to build up a lucrative private practice. By contrast, if the neutrals are not employees of the court, and if they have a private mediation practice, or an interest in developing such a practice, parties might worry about whether the neutrals have agreed to serve in the court's program primarily in order to "use" it (and whatever resumé value it may entail) to enhance their ability to attract more lucrative work in the private sector.

Ironically, this concern might be greatest in programs in which the neutrals serve in the court's program either for free or at substantially reduced rates. Similarly, there is a greater risk in programs in which the neutrals serve for free or for relatively little compensation that the parties will worry that the neutrals are not devoting their full resources (e.g., intellectual or time) to the

work—and therefore that the neutrals' contributions in the ADR process are likely to be superficial and unreliable.

Using full-time employees of the court to provide the ADR services also eliminates another, less likely source of concern about the motives of the neutrals. When the neutrals have active private law practices, some litigants might worry that the primary reason the lawyers are serving in the court's ADR program is to curry favor with the judges—favor that those lawyers might hope would yield advantages when they appear before the court as representatives of clients in other cases.

The staff-employee model also eliminates the possibility of another, related problem. In models that draw on service by lawyers who have private practices, and in which the court plays a role in determining which lawyers are sent the mediation work, there is a risk that the court could be perceived as establishing a clique of favorite lawyers—lawyers in whom the court has a special level of confidence and to whom the court is in some sense “beholden.” The rest of the bar might worry that these “anointed” lawyers enjoy unfair advantages when they appear in a court (in other cases) that has publicly expressed its confidence in them by appointing them to a panel of neutrals and sending work to them.<sup>47</sup>

A different fairness concern could arise if a lawyer who served the court as a full-time staff mediator resigned and then began appearing in adversary proceedings in that court. Individual courts will need to determine whether there is sufficient risk in this scenario to justify prophylactic rules. One obvious possibility (inspired by restrictions on appearances by former law clerks before the judges they served) would be to preclude a former full-time mediator from representing clients in the court that employed the mediator for some period after the mediator left the court's employ. If such a restriction were imposed, it is not clear how much harm it would do to the court's ability to recruit top-flight lawyers to serve as full-time mediators.

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<sup>47</sup> Courts that draw on the services of private practitioners can reduce this potential problem by having some outside group or institution select the neutrals for the court's panel and assign the cases to the neutrals. For example, a local bar association might perform this function, or some other (more broadly based) public or nonprofit agency. Courts also can avoid this problem if they play no role in the process by which parties enlist the services of a neutral—opting, instead, just to send the parties into the private sector. But all these kinds of “solutions” undermine or eliminate the court's ability to maintain quality control. These solutions also dilute the public's sense that the program really is the court's—and really enjoys the court's full confidence. The more remote the neutrals are from the court, the greater the dilution of the court's imprimatur and, with that, the dilution of the public's presumptive trust in the ADR process.

## COMPARING STRUCTURES FOR DELIVERY OF ADR SERVICES BY COURTS

Litigants who fear that a neutral is serving in order to curry favor with the court also might fear that the neutral will pressure them to settle (to please the judges even more) or will leak mediation confidences to the assigned judge (e.g., to encourage that judge to feel that the neutral has helped the judge identify the pressure points in the litigation). However, fear that the neutral might pressure the parties to settle, in order to please the judges, or might leak confidential information to the judges, also can arise in the staff-neutral model. In fact, I would guess that these kinds of fears would be greater under the staff-neutral model than under the others—because in that model the neutrals have the most to fear if the judges are displeased with their work,<sup>48</sup> and because in that model the neutrals are physically and institutionally closer to the judges than in any other model—so the temptations and opportunities for unauthorized communication are greatest.<sup>49</sup> All other things being equal (they never are), concern that the neutrals might feel pressure to push parties to settle, and concern that the neutrals might leak confidences to judges, would seem least likely to arise when the neutrals are most remote from the court—either shielded by another organization that orchestrates the provision of their services or selected by the parties on their own in the private market. As emphasized in other sections, however, “remoteness” between the neutrals and the court creates a host of other problems—some of considerable potential magnitude.

We shift focus here slightly to ask directly whether ADR neutrals are likely to enjoy more presumptive respect (from the public) under some of the models than under others. Are participants in the ADR program likely to vest, at the outset, a mediator who is a full-time employee of the court with more status or respect than a mediator who is not on the court’s staff? If the services of the mediator are provided through some other institution with which the court has a contract, does the level of respect for or confidence in that institution inure to the benefit (or detriment) of the mediator?

The answers to these questions are not obvious and could vary with the circumstances. Generally, I would guess that the closer the connection between the court and the neutral, the greater the presumptive respect the

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<sup>48</sup> This kind of concern suggests the advisability of exploring ways, under the staff-neutral system, to separate at least most of the judges in any given court from decisions about hiring and firing the neutrals. It might be wise, for example, to explore the pros and cons of having the neutrals hired and disciplined by a court’s top administrative officer, or, perhaps preferably, by a regional or state-wide body (composed, perhaps, of judges, administrators, lawyers, and other members of the public)—a group drawn from a much wider area than the area served by the court in which the staff-neutral is employed.

<sup>49</sup> See Pruett, *supra* note 8, at 15.

neutral is likely to enjoy. There certainly is more of a mantling effect when a court has made the neutral its full-time employee, has brought the person directly inside the judicial institution on a full-time basis, and, thereby, seems to directly “vouch” for the neutral’s integrity and ability. On the other hand, as just noted, parties may be more likely to worry that a mediator who is employed by the court might permit pressure to get the cases settled to distort his or her behavior (e.g., that such pressure might compromise the honesty and reliability of the mediator’s analytical feedback) than a mediator who is not dependent on the court for any significant portion of his or her income.

Moreover, considerable presumptive respect also could accompany neutrals whose services are directly provided by some other nonprofit organization—if that organization enjoys a clearly positive reputation within at least the subset of the community from which most of the parties who will participate in the ADR program will come. On the other hand, if the outside organization is not well known, the neutrals’ connection with it is not likely to inspire any special level of trust or respect—and might even engender some concerns (because the organization is an “unknown”). Of course, if the outside organization is controversial (e.g., identified with one end of the political spectrum or with a policy agenda that is not shared by some appreciable portion of the community), the neutrals that organization provides are likely to be saddled with negative presumptions, or at least suspicions, about their underlying motives, their capacity to be impartial, or their competence.

Courts that consider having an outside organization provide ADR services, or arrange for work by neutrals, also should be sensitive to the possibility that parties might worry that institutional self-interest might infect the provision of service by the organization or the way its neutrals perform their tasks. Suspicions can arise even about the motives of “nonprofit” organizations. Such organizations have staff—and parties might fear that the staff’s decisions could be affected by their presumed interest in their salaries and expense accounts. Moreover, the world of nonprofit ADR providers is not immune from competition and from the temptations of empire building. Parties are likely to assume that even nonprofit organizations want to survive and prosper—and that assumption might cause parties to fear that institutionally selfish motives could infect the delivery of ADR services.

Presumptions of respect also could be affected by what the public knows about the level of compensation the neutrals receive for their work—a matter we address in a subsequent section. We simply note here that any presumption of respect that mediators who are employed by the court might enjoy could be diluted if users of the system understood that the compensation the staff

mediators receive is appreciably lower than the compensation that quality professionals earn in the private sector.

*D. Messages About the Role of Courts in Our Society and About the Relation Between the Public and the Private Sectors in the Provision of ADR Services*

We consider next what messages the adoption of the different models might send to the public about the role of the courts in our society and about the relation between the public and the private sectors with respect to the provision of ADR services.

The model in which full-time employees of the court directly provide the ADR services affirms most clearly the view that the courts have a broad responsibility to help people resolve their disputes. More than any of the others, this model signals the courts' commitment to the notion that if processes other than traditional litigation best serve the dispute resolution needs of some substantial number of cases, the courts have a responsibility to employ or offer those processes. In sharp contrast, the model that sends this message least clearly is the model under which courts send parties into the private market and require them to pay the fees of the private neutrals.

Significantly, the staff-neutral model also most clearly signals society's direct encouragement of constructive approaches to communication and problem solving, and it represents an unequivocal endorsement of the fundamental notion that there is a real societal good in resolving disputes consensually. A court that directly involves itself only in traditional adversary litigation could be perceived as making a value judgment about approaches to problem solving—as implying that the most important and most highly valued procedures for resolving disputes are those that are essentially combative and competitive. In sharp contrast, a court that visibly commits its own money and its own staff resources directly to a mediation program very clearly puts its imprimatur on the notion that traditional adversarial litigation is not always the most appropriate or the most effective way to address problems—and that there can be real value in a process that requires substantial cooperation and in which the communication is more direct, more open, and more sympathetic than it often is in traditional litigation.

A more complicated picture emerges when we consider what messages the different models send about what the relationship should be between public and private provision of ADR services. On the one hand, by endorsing ADR so clearly, the court that adopts the staff-neutral model affirms the importance of the notion that it is good for private parties to retain power to fix the terms

of the disposition of their disputes—rather than to relinquish that power to a judge or jury. In this way, a court that adopts the staff-neutral model encourages parties to accept greater responsibility for what happens to them—and signals that the private, consensual resolution of problems is, generally, a social good.

On the other hand, if the only ADR services that the court clearly sanctions are services provided by its employees, the public might infer that the court either believes that the courts should fully occupy the ADR field or that there is some reason to lack confidence in ADR services provided by the private sector. The pure staff-neutral model incorporates no symbolic acknowledgment of the possibility that what is best for our society is to have vigorous contributions simultaneously from both the private and the public sector, and that what is best for ADR is to have an ongoing, cooperative, dialectical relationship between the private and public sectors, each teaching and enriching the other, and each meeting needs the other cannot. The model that would best send these messages would be a hybrid: some provision of ADR services by staff-neutrals, some by neutrals from the private sector—the latter with the court's imprimatur, if not its active involvement.

## VI. COMPARING THE MODELS: FAIRNESS

### A. *Democratization of Access*

Democratization of access to mediation services can be an important element in public perception of the fairness of a court-connected program. The model in which professionals on the court's staff directly provide the mediation services appears to interpose the fewest economic, procedural, and sociological barriers to participation. The mediation service is free—so no party is frozen out because it cannot pay. The procedural path of access is most straightforward—it can be traversed within the same floor of the same building in many instances. And, unlike referrals to a private organization or private mediator, there is less occasion to fear the unknown, to feel intimidated, or to worry that the process will be unfair—after all, the service is being directly provided by the same public institution whose charge is to assure process fairness and to protect the weak against unfair procedural advantages that the strong might otherwise enjoy.

There are two potentially very important dimensions of "access democratization," however, in which this model can be much less attractive than some of the others. Because public money to support court programs is



limited, a court that adopts this model will probably be able to hire only a small number of professional mediators. Unless the case population that the court's program targets is narrowly defined, it is quite likely that the demand for mediation services will exceed, at least in metropolitan settings, the supply of staff mediators. Other models, especially those that rely largely on unpaid volunteers or that send parties into the private sector to find (and pay) their own neutral, can provide services to much larger numbers of cases. This can be a very significant factor for courts that want to offer mediation services to large numbers of cases and that believe they can achieve appropriate levels of quality control even when their panels or rosters of neutrals are very large and include some people who are involved in ADR sessions only occasionally.<sup>50</sup>

Moreover, courts that adopt models that involve large pools of neutrals also can achieve much greater diversity (of professional background, expertise and perspective, as well as gender, race or national origin, and sexual orientation) within the group that provides the ADR services than courts that rely on small staffs of employee neutrals. In ways we explore in the next section, diversity within the panel of neutrals could affect public confidence in the fairness of the court-sponsored ADR program.

There is one additional dimension of the "democratization" perspective that warrants mention at this juncture. This dimension would only indirectly affect public feelings about the fairness of an ADR program, but I point to it now because of its dependence on the size of the pool of neutrals in a court's program and where those neutrals are drawn from. Models that train and use large numbers of neutrals from the private sector would appear to be much more effective than the other models at spreading the culture of ADR. When larger and more diverse groups of people are trained as neutrals, the constructive spirit and the process ideas that inform ADR can reach faster and farther into our society—and into a range of sectors that is much broader than it would be under models that rely on smaller and less diverse pools of neutrals. Some program designers believe that training in ADR (especially mediation) affects how neutrals behave not only when they are serving the court, but also when they practice law or conduct the other affairs of their lives—thus spreading less adversarial and less rigid modes of interaction into many different parts of the social fabric.

These are pluses for people who believe in ADR—but they also can have fairness benefits for court programs. The better the understanding and the wider the knowledge of ADR processes, the more court programs are likely

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<sup>50</sup> We discuss barriers (administrative and economic) to quality control under non-staff-neutral models in Part VII, *infra*.

to be accurately understood and appropriately utilized. These developments can lead to less abuse of ADR processes and fewer frustrated ADR expectations—which, in turn, yield fewer occasions for parties to feel that their participation in an ADR proceeding ended up being unfair.

*B. Expectations About the Neutral's Role in Assuring Fairness and Impact of Choice of Model on Those Expectations*

Generally, we would expect the parties' sense of the fairness of the ADR process they experience to be affected at least in some measure by how closely that process conforms to their expectations about the nature of that process—especially expectations that the parties believe the court encouraged. If that is so, one of the questions we should ask is whether the model the court adopts could affect the parties' (as opposed, perhaps, to the lawyers') expectations about the role the neutral will play in the ADR process. More specifically, could the model itself encourage the parties (even if not their lawyers) to develop expectations about how analytically active or evaluative the neutral will be, or about the circumstances in which the neutral will intervene in the process to make sure that it remains "fair" in some sense?

The answers to these questions could be affected by at least three major variables. The first is the expectations the parties have about the role (responsibility for fairness) of the court generally in civil litigation. The second is the nature of the ADR process and the announced roles of the neutral in it. And the third is the perceived closeness of the connection between the court and its ADR neutrals.

Parties who believe that the court, as an institution of democratic government, has considerable responsibility in civil litigation generally for assuring fairness (both procedural and substantive) are more likely than others to expect ADR neutrals to take proactive steps to assure fairness during ADR proceedings.<sup>51</sup> But even if we limit our focus to lawyers and to procedural fairness, we still encounter very divergent views. Adherents to the traditional notions that allegedly informed the development of the adversary system could be offended by judicial interference even to protect basic procedural rights. Social Darwinists would expect the courts to remain very passive—to do

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<sup>51</sup> There probably is a wide range of expectations among parties and, to a lesser degree, among lawyers, about the level of responsibility courts have for assuring fairness. Sophisticated users of the court system will be careful to distinguish between procedural fairness and substantive fairness—and presumably will expect a higher level of responsibility in the courts for the former than for the latter.

nothing more than to issue rulings in reaction to initiatives taken by counsel. On the other end of the spectrum, aggressive proponents of managerial judging would expect judges to take proactive roles (1) in fixing process rules that assure fair access to evidence, (2) in identifying the issues, and even (3) in helping steer the parties toward the most important evidence. Such expectations would be intensified in ADR programs that expressly include an evaluative or quasi-directive role for the neutral.

And these expectations could be intensified even further by the model the court chooses for delivering its ADR services. Among all those models, the one in which the parties are most likely to expect the role of their ADR neutral to track the role the parties would expect a judge to play is the staff-neutral model. In that model, the parties are most likely to assume that the judges hired the neutrals, that the neutrals “work for” and in some sense “report to” the judges, and that the neutrals are doing work that the judges otherwise might be called upon to do. In sum, it is in the staff-neutral model that the parties are likely to perceive the connection between the ADR neutrals and the judges to be closest. And because of that closeness of connection, it may well be that it is in the staff-neutral model that the parties are most likely to expect the ADR neutrals to act like judges, or at least to assume a similar level of responsibility for the fairness of the ADR process.

Thus, parties who believe that the court generally is responsible for fairness in civil litigation may well expect staff-neutrals to take proactive steps to assure fairness during ADR proceedings—regardless of what the court’s literature says about neutrals having limited responsibilities. In contrast, the same parties might expect much less activist intervention by a neutral whom they hired in the private market, a neutral whose connection with the court is thin, at best.<sup>52</sup>

Stated differently, I suspect that whether the neutral is an employee of the court could affect the parties’ expectations about the role the neutral will play and how the neutral would respond to various ethical dilemmas—even in processes that are nominally the same (e.g., even in mediations governed by the same rules).<sup>53</sup> Because I suspect that most people feel that the courts

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<sup>52</sup> The model in which the court simply sends the parties into the private sector to find and pay for their own neutral seems closest to Social Darwinism—and thus least likely to engender expectations that the neutral will actively interfere with whatever course the mediation seems “naturally” inclined to take.

<sup>53</sup> This clearly is an arena in which we need empirical studies. We need to know whether the fact that the neutral is an employee of the court has any effect on the expectations of the parties (or their lawyers) about the roles the neutral will play (in processes that are nominally the same, e.g., mediation) and about how the neutrals might

should be responsible for assuring the fairness of what happens in judicial proceedings, I believe that parties are more likely to expect a neutral who is a court employee (than a neutral who works primarily in the private sector) to be sure that every party has all the information it needs and that the information the parties have at least about the law is accurate;<sup>54</sup> to assure that a stronger party does not take unfair advantage of a weaker party; and not to permit the parties to execute an agreement that is unenforceable, unlawful, or substantially out of line with the real settlement value of the case.

If an institution outside the court orchestrates the provision of the ADR services, the parties' expectations about the role the neutral will play could be affected by the reputation of that institution—and the values it is believed to stand for or the interests it is publicly committed to advancing. For example, if mediation services in a family law court are provided by an institution that is committed to protecting the best interests of children, parties might expect the neutrals to develop specific ideas in particular cases about what those best interests are, then to guide or push the parties in that direction.

Because parties are not likely to respect a program if the neutrals' behavior deviates substantially from the parties' expectations, each court should consider whether its choice of model will affect those expectations—and should take active steps to assure that they are in line with the role the court actually wants its neutrals to play. A court that wants its neutrals to play a very passive role should think twice before adopting the staff-neutral model.<sup>55</sup>

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respond to specific ethical dilemmas. Researchers should try to determine, for example, whether parties are more likely to expect a neutral who is a court employee than a neutral from the private sector to take steps to compensate for imbalances in power between the parties (and whether it matters what the nature of the imbalances are—for example, analytical, emotional, or economic). Are the litigants more likely to expect a neutral who is a court employee to protect a party from entering an agreement that is "unfair"? Are the parties more likely to expect a neutral who is a court employee to tell the parties about case law or statutes that they are not citing but that could play an important role in determining what their rights and obligations are?

<sup>54</sup> More specifically, I suspect that parties are more likely to expect a staff-neutral than a non-staff-neutral to tell them about case law or statutes that the parties do not appear to be aware of but that could significantly affect their rights and obligations.

<sup>55</sup> At a minimum, a court that adopts the staff-neutral model but that wants its mediators to play a very passive role should actively educate the parties about the limits it imposes on the conduct of its mediators.

*C. Risk of Process Distortion from Parties Equating ADR Neutrals with Judges*

These observations lead us to a related and potentially significant question. Is there a relationship between the apparent closeness of the connection between the ADR neutral and the court, on the one hand, and, on the other, the level of risk that parties will look for suggestions or directives from the neutral or feel pressure (unintended) to move in directions they believe the neutral wants? This question arises from the possibility that the closer the perceived connection is between the ADR neutral and the court, the greater the risk is that the parties (perhaps subconsciously) will equate the neutral with the court. In other words, the tighter the connection the greater the risk that the parties will assume that the neutral *is* the court—and then react to the neutral as they would react to the court itself.

I do not know how likely this kind of equation of neutral with judge is, but if it occurs, it could have serious negative repercussions. It could incline some parties toward greater procedural formality and caution, and could lead them to play their interest and informational cards very close to the vest. More dangerous, a party's subconscious identification of the neutral with the judge could increase the risk that the party would perceive pressure where none was being applied, or that the party's decisions would be distorted by fear of displeasing the neutral or by some misplaced sense of responsibility to do what the neutral wanted them to do.

Equating the neutral with the court, or a judge, also could inspire (again subconsciously) excessive deference. It could lead parties to invest the neutral with greater wisdom and a more important role than the neutral really has. That, in turn, could lead parties to be too concerned about what the neutral thought, and to spend too much time looking for clues or guidance from the neutral about what to do. All of these behaviors and concerns would distort the parties' participation in the ADR event—thus compromising it philosophically and undermining its value to the litigants.

The risk that parties would mistakenly equate the neutral with the court, and that that equation would distort their participation in the ADR process probably varies with a number of factors in addition to the perceived closeness of connection between the ADR neutral and the court. The level of this risk will depend in part, of course, on the level of the parties' sophistication about the legal system and about ADR. There is little risk, for example, that institutional litigants who are repeat users of the system will slip into this misunderstanding. The magnitude of this risk also could vary with the kind of case, the stage in the proceedings, and the role the neutral plays—the more the

neutral performs functions that look like functions the court performs (e.g., case management and evaluation) the greater the risk of equation. Among all factors, however, the single most important probably will be whether the parties are represented by counsel.

#### *D. Confidence in the Neutrality of the Neutrals*

The public's confidence that any given ADR program is fair depends vitally on the perception that the people who serve as the neutrals really are neutral, free of any kind of bias or predisposition. Comparing the models with respect to the many different factors that can affect party confidence in the impartiality of the neutral is a complicated undertaking, and not all factors point to the superiority of any one model. On balance, however, I am inclined to the view that the staff-neutral model is likely to deliver the most confidence in the impartiality of the neutrals. The thoughts that support this view follow.

First, I would expect that once a professional becomes an employee of the court and works full time as an agent of the court, that professional would enjoy the presumption of neutrality with which the people generally greet judges—virtually all of whom formerly were lawyers, and most of whom could have been identified, when they were lawyers, with one side or another or with one institutional leaning. But once they become judges, most of the time they probably are presumed to be neutral—as able for all essential purposes to set aside their background and to face each case and litigant with a fresh, open-minded perspective. I would expect professionals who become full-time members of the court's staff to be viewed similarly.

Parties may be appreciably less likely to vest private sector neutrals with this presumption of neutrality.<sup>56</sup> If the likelihood of the vesting of this presumption varies with the perceived distance between the private mediator and the court, a court that wants its privately employed neutrals to enjoy this presumption would be required to take active steps to publicize its connection with and endorsement of the neutral. But undertaking such affirmative steps can be burdensome and dangerous. For starters, courts should be very careful

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<sup>56</sup> This is another assumption that should be tested empirically. It is possible that perceived tightness of connection between the mediator and the court has virtually no bearing on the likelihood that the mediator will be presumed to be impartial (so that everyone who serves with the court's blessing, regardless of how remotely conferred, is greeted with substantially the same set of assumptions about neutrality)—or that other factors play much more important roles in determining whether a mediator is likely to be perceived as neutral.

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to assure themselves that a mediator really is good and ethical before endorsing that person. That kind of assurance can be achieved in different ways, but most of them are expensive—e.g., by providing or paying for extensive (and graded) training for the neutrals or by conducting labor-intensive research into their backgrounds and experience, interviewing them, and observing them perform as a mediator (which can require very different skills than performing well as a litigator).

Moreover, as noted above, a court that actively endorses some neutrals can create the impression that those neutrals (a small sub-group within a professional community) enjoy a special level of confidence by the court—giving those professionals a resented leg up in the marketplace and in the courtroom.

Aside from these kinds of difficulties, when the neutrals are persons who work primarily in the private sector there are many more occasions for concern about their impartiality. Bias (actual or perceived) could infect neutrals through the source of funds used to compensate them, the ties they retain while they are on the court's roster of neutrals, and the other work or activities in which they engage while they are serving in the court's program. For example, parties might wonder whether a mediator with a private ADR practice might tend to favor a major institutional player that might serve as a source of repeat business for that mediator in her private practice. More commonly, a party could have serious questions about the neutrality of mediators who have active law practices in which they spend disproportionate percentages of their time either on the plaintiffs' side or on the defense side. A plaintiff might worry that a lawyer who usually represents corporate defendants, for example, would have so absorbed one perspective that she is not capable of bringing a truly open mind to a mediation assignment.<sup>57</sup>

Moreover, courts that use an outside organization or institution to provide mediators, or to facilitate the provision of ADR services, add another player to the mix—and thereby increase the risk that fear of bias, or perception of bias, will compromise parties' confidence in the impartiality of the neutrals. As noted earlier, fear can be spawned simply by ignorance—and if parties are not familiar with the organization that provides the mediators, they may be fearful that that organization is driven by an agenda that is inconsistent with impartiality. An even more difficult situation arises if parties think they know

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<sup>57</sup> Some parties also might worry that a mediator whose private practice is disproportionately on one side (plaintiffs or defendants) will *overcompensate* in an effort to achieve fairness or the appearance of fairness—and end up being more demanding of the side she usually represents.

the outside organization and identify it with controversial, or not universally shared, political or social views. A court that “partners” with an outside organization imports any reputation baggage that organization carries. Even publicly supported, community based, nonprofit organizations can be burdened with such baggage and thus can trigger fears in some litigants. Parties with strong conservative political views, for example, might assume that a community-based nonprofit organization is dominated by persons with left of center politics, persons who are motivated by a desire to promote the interests of the working class, minorities, and women. Fear of agendas like these could compromise confidence in the impartiality of neutrals who are provided by organizations other than courts.

None of these issues is likely to surface in a court that uses only staff (court-employee) neutrals and that requires its neutrals to sever other professional ties and to forsake other employment, as well as other activities that could call the neutrals’ impartiality into question. In short, the incidence of perceived conflicts of interest is likely to be lowest in the staff-neutral model.

The incidence of actual conflicts of interest also is likely to be lowest in this model—because it provides the court with the tightest control over the selection, training, and monitoring of its neutrals—and thus with the best ability to screen out biases and conduct that suggests bias.

While courts who use mediators from the private sector can develop conflict of interest and disclosure rules that respond in part to concerns like these, it is likely that no amount of regulation of such matters will completely dispel generic fears with these kinds of sources. Furthermore, as we discuss in a subsequent section, developing and administering conflicts regulations for large numbers of neutrals drawn from the private sector can be very labor-intensive.<sup>58</sup> It also can pull the court into no-win situations—where a ruling

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<sup>58</sup> One dimension of this burden that my court did not fully anticipate involves trying to set up rules that give neutrals clear guidance about what limits their service as a mediator in the court’s program imposes on the work they can accept *in the future*. For example, we have been asked for guidance about whether a neutral is forever barred from representing a client that was a party to a mediation which the neutral hosted. Or whether the law firm in which the neutral works is so barred. If the answer to these questions turns, at least in part, on whether there is a connection between the subject matter of the mediation and the subject matter involved in the later representation, the court may be asked to promulgate guidelines or to resolve close questions about what constitutes a barring connection. If these rules are too demanding, neutrals will be discouraged from serving, but if the rules are not demanding enough, the public might lose confidence that the neutrals are serving without conflict of interest. For a thoughtful discussion of these kinds of problems, and suggestions



will leave either a neutral feeling insulted or a party feeling unfairly jeopardized. Using staff-neutrals enables a court to avoid virtually all of these kinds of problems.

While detecting biased or otherwise inappropriate behavior is likely to be appreciably easier in the staff-neutral model, it is not as clear that this model offers the most effective setting for disciplining neutrals who breach duties or do not perform well. The staff-neutral model offers clear advantages when the appropriate discipline is relatively mild or when the only thing the neutral needs is some additional education. If what is needed is counseling, a reprimand, or, perhaps, a modest benefit loss, there is much to commend the staff model. These kinds of discipline can be imposed relatively easily and their effectiveness can be assessed more reliably than under other models.

But the legal and sociological obstacles to imposing more severe forms of discipline can be appreciably higher under the staff-neutral model than under all the others. In many settings, it will be very difficult and may be very expensive to terminate, suspend, or reassign a staff mediator.<sup>59</sup> In addition to potentially formidable procedural and substantive barriers to such action, a court is likely to resist coming to the conclusion that it made a serious error when it made the decision to hire the person serving in its program—so the court's ability to be objective in reviewing the neutral's performance and the court's willingness to take appropriate corrective action could be compromised.

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about which sources of norms offer the best guidance for addressing these kinds of issues, see generally *Poly Software Int'l, Inc. v. Datamost Corp.*, 880 F. Supp. 1487 (D. Utah 1995).

<sup>59</sup> Because of the potential difficulty of firing someone who is not performing well, courts that adopt this model might consider a couple of steps they could take to reduce the likelihood that they would get stuck with a staff mediator who performs poorly or who otherwise behaves in ways that do not reflect well on the court. One possible step is to establish clear periods of probation for all newly hired staff-neutrals (e.g., for six months or a year). As Robert Rack (Chief Mediator for the United States Court of Appeals for the Sixth Circuit) has pointed out, however, a system like this could make it difficult to attract high quality people to these positions—especially in urban areas where the salaries may not be fully competitive with the private sector.

Another way to respond to this kind of problem, also suggested by Mr. Rack, would be to make appointments to these positions for fixed terms, either renewable at the discretion of the court or not renewable at all. A nonrenewable term also probably would hurt the capacity to recruit talented neutrals—especially if the term were only a few years.

Courts also need to attend to the length of the professional learning curve for staff-neutrals. The longer the angle of that curve remains steep (upward), the longer a fixed term for the staff-neutrals' employment would need to be.

The barriers to removing a neutral from a large panel, by contrast, can be appreciably lower—especially if the neutrals are serving as volunteers or rely on referrals from the court's program for only a small percentage of their income.<sup>60</sup> Moreover, a court has much less of its ego invested in people who serve in large pools of neutrals and who mediate court-referred cases only on a very part-time basis with little or no pay.

Another vantage point from which to think about perceptions of bias in court-sponsored ADR programs focuses on the composition of the pool of people who make up the corps of neutrals. How important the specific character of the profile of that pool is could depend on a number of variables, not least of which would be the kinds of cases and clients whom the court wants to serve. But at least in some settings, it can be important (to the goal of encouraging a feeling that the neutrals are not biased) to have a pool of mediators either (1) that reflects a wide and representative range of backgrounds and perspectives or (2) that assures litigants in focused classes of cases that their neutrals will be people whose experience equips them to understand and appreciate the unique circumstances faced by a particular segment of the population.

We explore first the relationship between public confidence in the impartiality of the neutrals and diversity in the panel. Under each of the models, of course, there is some risk that the public will feel that the neutrals are drawn exclusively, or predominantly, from groups with affinities for particular interests or kinds of clients—so every court, regardless of the model it adopts, must be sure that its pool of neutrals does not reflect disproportionately the views of only one part of the client base that the program will serve. But the challenge of developing a panel of neutrals that is perceived to be broadly diverse and “representative” obviously is greatest when the panel is smallest—and the panels are likely to be smallest under the staff-neutral model. Developing a panel of neutrals that is richly diverse will be much more feasible in the models in which the court pays persons from the private sector to serve or orchestrates service by volunteers.

Moreover, in some programs, some of the kinds of people the court will want to serve as neutrals will not be able or willing to work full-time as court employees—they will have other commitments that they will not be willing to

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<sup>60</sup> While the likelihood that a member of a court's panel of neutrals would sue if removed from the panel seems small, as does the likelihood that such a suit would survive a motion to dismiss, it has been rumored that at least one such suit has been filed against a state court program.

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sacrifice, or they will have salary requirements the court could not meet.<sup>61</sup> Such people might be willing to serve—but only if they could do so on a limited, very part-time basis. Stated differently, in some situations courts simply will not be able to hire as full-time employees the kinds of people who will bring to the ADR table the backgrounds that will be necessary to inspire all groups of parties to believe that they are being heard and understood. Parties who believe they are not being heard and understood are more likely to feel that their neutral is biased.

So when designing their programs, each court or court system should identify the universe of cases it wants to serve and then make judgments about (1) how important diversity in the panel of neutrals will be to the litigants in that universe,<sup>62</sup> (2) what the specific character of the appropriate diversity will consist of, and (3) how many neutrals the panel would need to include in order to achieve that kind of diversity.

In making these kinds of judgments, courts will understand, of course, that the individual ADR sessions will not be hosted by the whole panel of neutrals, but, usually, by one human being.<sup>63</sup> The background of that one human being will not parallel in composite the breadth and diversity of backgrounds in the entire pool—and in some cases, at least, one or more of the parties is likely to feel that the background of the individual human being who serves as the neutral in their case does not match up well with their own

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<sup>61</sup> Examples might include people who have active civil rights practices or who work for public or nonprofit agencies that focus all their resources on addressing particular kinds of problems in which the neutrals have an abiding interest. Another example might consist of very highly paid intellectual property lawyers—who are not willing to give up their private sector income in order to work full time for the court, but who are willing, as a matter of public service, to mediate a few cases a year.

<sup>62</sup> The importance of breadth or diversity of background in the profile of the court's neutrals, or that the neutrals bring particular kinds of experience to their work, also can depend, in part, on the role the court asks the neutrals to play. Generally, the more analytically active or evaluative the court wants the neutrals to be, the greater the need for neutrals with backgrounds that the parties believe equip the neutrals to understand the parties' circumstances and the issues that arise in their kind of case.

<sup>63</sup> Some ADR programs may permit or provide for service by more than one neutral in one ADR session. For example, some programs might provide for a lawyer and an accountant to serve simultaneously as comediators, or, more generally, for comediations by two-person teams made up of a person with especially strong process skills and another person with especially deep subject matter expertise. And for cases of unusual sensitivity, some programs might provide for service by a politically or sociologically balanced team of three neutrals. But most court-sponsored programs will likely be constrained to rely in most cases on the service of a single neutral.

background. This inevitability, however, does not mean that diversity and breadth of background in the pool of neutrals is unimportant. Macro-level confidence in the balance and breadth of the pool can be very important, by itself, to the public's embrace of a program as fundamentally fair. And individual litigants probably are less likely to worry about bias in individual neutrals if those individual neutrals are part of a larger pool that is known to be well balanced and in some relevant sense representative.<sup>64</sup> Moreover, a court whose pool of neutrals includes broad ranges of backgrounds is appreciably better situated than a court with a narrow pool to find in any given case a neutral who enjoys the confidence of both sides (either because both parties share one kind of background or because the court can find a neutral whose background includes something important to each party).

If, after taking all these matters into account, a court concludes that the profile of the panel of neutrals would significantly effect the pertinent public's<sup>65</sup> confidence in the fairness of the program, and if the needed profile cannot be achieved through a staff of full-time court employees, the court will be forced to make difficult judgments about the relative importance of the other benefits that the staff model delivers—and will need either to choose a different model or to establish a panel of neutrals from the private sector to supplement (perhaps only for a defined group of cases) the services the staff-neutrals provide.

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<sup>64</sup> Ironically, a pool of neutrals that includes people from the far ends of relevant perspective or experience spectrums might increase the likelihood that a party to an ADR session would identify the neutral assigned to her case with an extreme point of view—and assume that the assigned neutral would be biased in favor of certain kinds of parties. Courts that build pools of neutrals that include persons visibly on one end of any pertinent spectrum should take special steps to reassure the public about the absence of bias in the people who serve and to teach their neutrals how to dispel fears about partiality.

<sup>65</sup> By "pertinent public" I mean, at a minimum, the segment of the public that is to be served by the particular ADR program.

### E. Fear of "Leaks" and of Retribution for "ADR Failure"

The rules that govern many ADR programs promise the participants that the content of their discussions during a mediation<sup>66</sup> will remain confidential and that the mediator will not divulge the parties' secrets to the assigned judge, or tell him or her anything about the positions the parties took during the mediation. In programs that make these kinds of promises, parties would justifiably feel that breaches of these promises, especially in the form of secret communications from the mediator to the judge, would be unfair.

Is the risk of this kind of perceived unfairness any greater or any smaller under the in-house model (where the mediations are hosted by professionals employed full time by the court) than under other models? Probably. It would at least appear to outsiders that there is more opportunity for contact between the mediators and the judges when they all work in the same institution (perhaps in the same building) all the time. And litigants might assume that the temptation to engage in proscribed communications would be greater in this setting. They might suspect that the judges would be less reluctant to call a court employee about a case than an outside mediator, and, compared to outsiders, staff mediators might have greater incentives to try to please the judges for whom they work, or to help them better understand and manage their cases.

Fears about these kinds of temptations and incentives might make participants in the mediation program worry more about the reality of confidentiality when the mediator is a full-time employee of the court. And there is some anecdotal evidence from Ohio<sup>67</sup> that suggests that the risk of inappropriate disclosures to the judges is in fact greater when the neutrals are court employees than when they are not, but this is another arena in which we need considerably more empirical research (both about the actual risk of inappropriate communications and about levels of concern in parties about such communication).

We also should ask whether different models create different levels of risk that parties will fear that the court will retaliate against them in some way if

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<sup>66</sup> I focus on mediation in the text because the promise of confidentiality is likely to be clearest when the ADR process used is mediation. For some other kinds of ADR processes—e.g., nonbinding arbitration—there are likely to be much more limited promises of confidentiality. In arbitrations under 28 U.S.C.A. §§ 654–658 (West Supp. 1999), for example, a party could make a record of statements made under oath during the arbitration and might be able to use such statements for purposes of impeachment at a later trial.

<sup>67</sup> See Pruett, *supra* note 8, at 15.

their ADR session fails to produce a settlement. Such fears would be compounded if the parties also were apprehensive that the neutrals might be leaking information about the sessions to the judges—secret reports to the judges that purported to identify the parties who were to “blame” for the “failure” of the mediations would profoundly compromise a mediation program (both philosophically and practically). The model that probably would provide the highest level of reassurance to the parties about these matters is the model in which the court contracts with an otherwise unrelated nonprofit institution which, in turn, selects, trains, and deploys the mediators. Under this model, unlike any of the others, there is an extra layer of institutional insulation between the judges and the mediators—and little apparent reason for the parties to worry that the neutrals might engage in direct communications with the judges—such worries would be even less likely if the court had not visibly spent a lot of its money on the ADR service that the outside institution provided.

By contrast, fear about retaliation by the court for “ADR failures”<sup>68</sup> might well be greatest when the neutrals are full-time employees of the court. Ironically, one of the sources of this concern would be the same fact that would support an inference that the courts that adopt the staff model are the most committed to and supportive of ADR. Parties might fear that a court that has sacrificed real resources of its own to support the ADR program is more likely to be upset if the ADR sessions fail to produce settlements (or other readily visible, practical benefits) than a court that appears to have committed less to the ADR undertaking. Parties who are afraid that the judges or the court administrators will be angry if their cases do not settle also may be afraid that they will suffer some form of administrative or judicial retribution—perhaps being sent to the end of the trial queue, or perhaps facing a silently “adjusted” legal standard in a ruling on a motion for summary judgment.

Given the several different kinds of fears and misperceptions I have described in the preceding sections, courts that make strong and visible commitments to their ADR programs, especially courts that opt for the staff-neutral model, would be well advised to take special steps to reassure the public that their neutrals will engage in no ex-parte communications with the court, that the content of the parties’ communications during the ADR

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<sup>68</sup> I put this phrase in quotation marks to signal that it is a complete non sequitur to suggest that there has been an “ADR failure” when an ADR session does not produce a settlement. As I hope is obvious, much that is good and constructive can be achieved in ADR sessions that yield no consensual disposition of the dispute.

proceedings will not be disclosed to the judges, that the court knows that its ADR program can be valuable and successful (under a wide range of measures) even when cases do not settle, that neutrals who serve the parties in the ADR setting are not judges and should not be equated with judges, and that the court will take absolutely no adverse action against any litigant or case in which no settlement is achieved in the ADR process.

## VII. COMPARING THE MODELS: THE QUALITY OF THE NEUTRALS AND OF THEIR ADR JOB PERFORMANCE

As I argued earlier, I believe that respect for and trust in an ADR program, and confidence in its essential fairness and integrity, are likely to depend more on the quality of the neutrals and the way they perform their functions than on anything else. It is, therefore, especially important that we try to determine whether some of the models are likely to deliver appreciably higher quality neutrals and “neutraling”<sup>69</sup> than others. I hope that future empirical research will include substantial exploration of this question. In the absence of such research, however, we must try to identify factors that could affect the quality of the delivered services under the different models.

Before turning to those factors, it is useful to restate the criteria that I believe are essential<sup>70</sup> to the definition of “high quality” service by an ADR neutral in a court-sponsored program. At the center of every court’s soul is commitment to procedural fairness and to treating all parties equally under the law. Because they work in court-sponsored programs, and will be viewed at least in some measure as agents of a court, neutrals in these programs must always behave in ways that are consistent with the core values for which the courts stand. Thus, the neutrals in a court’s program must (1) have deep moral integrity and commitment to procedural fairness; (2) be scrupulously honest; (3) be unwilling to resort to emotional or intellectual manipulation to achieve ends;<sup>71</sup> (4) be respectful of others; (5) be able to listen to all parties with the

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<sup>69</sup> I apologize for this subversion of established forms of our language. I use this unconventional form only because it is so efficient.

<sup>70</sup> As noted much earlier in this Essay, some of the criteria for defining “high quality” service may vary with the purposes of the particular ADR program, with the character of the role the neutrals are instructed to play, and with the kinds of cases, circumstances, and parties the neutrals will serve. See discussion *supra* Part II.A.

<sup>71</sup> This quality is very difficult for any human being to develop—but may prove especially elusive for lawyers who spend most of their time working in the adversarial culture of our traditional litigation system. That culture, at least as experienced in many

same open and unbiased mind; (6) be capable of empathy and able to hear emotionally subtle messages; (7) be able and willing to follow procedural protocols; (8) be able to sustain, in trying circumstances, firm discipline over intellect, emotion, and conduct—and to repress temptations to form opinions prematurely; (9) be committed to service and able to project a strong desire to help others; (10) bring sustainable energy and a positive spirit to the ADR work; and (11) be able to comprehend new material quickly, to reason reliably, and to assess accurately the limits of their own understanding, intelligence, and powers of prediction.

### *A. Ability to Attract Neutrals Who Possess the Requisite Qualities*

We begin this section by exploring the factors that could affect significantly the courts' ability to attract high quality people to serve as neutrals. How do the models compare in this important arena?

One factor that might be important is level of compensation. We do not know as much as we need to about how much compensation the various models<sup>72</sup> could deliver to neutrals. We also know too little about how variations in levels of compensation affect the capacity to attract and retain neutrals, or the quality of the service the neutrals perform in individual cases. These are arenas in which substantial empirical research could make a valuable contribution.

Outside the major metropolitan areas, the compensation courts could offer full-time mediators might not be substantially less than the compensation that

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quarters, teaches, encourages, and rewards manipulative behavior. That fact might make it especially difficult for people who are otherwise full-time litigators to identify (in themselves) manipulative impulses and to forsake manipulative ways when they are serving as an ADR neutral. For some kinds of *mediation* programs, these considerations may make more attractive the models that do not use as neutrals lawyers who spend the bulk of their time in traditional civil litigation.

<sup>72</sup> The one obvious exception to this generalization arises in the model in which the mediators are volunteers who serve for the most part without compensation, as a form of public service. Neutrals who serve in programs operated under this model have extremely limited opportunities for compensation. See N.D. CAL. ALTERNATIVE DISP. RESOL. LOCAL R. 5-4, 6-3 (1997). These rules require the evaluators in the early neutral evaluation program and mediators in the mediation program to serve for no compensation through the first four hours of the ADR session; thereafter, the neutrals may continue to serve without pay (which is usually what happens), or the parties and the neutrals may agree to terminate the process or to make arrangements under which the neutral would be compensated at a rate of \$150 per hour (at least through the next four hours of service).



first rate lawyers or other professionals could earn in private practice. In the metropolises, however, it is quite likely that courts will not be in a position to offer staff mediators anywhere near the level of compensation that the best lawyers or health care professionals can earn in the private sector. We simply do not know how significant this fact is likely to be. If the neutrals in a given program need not be lawyers, salary limitations may not be as substantial a factor in recruiting. But even if most of the neutrals in a program are lawyers, it does not necessarily follow that lower salaries would force the court to accept less than fully competent neutrals.

For some very good professionals, money is by no means the controlling factor in job selection. Good people are attracted to jobs in which they are asked to spend their time trying to do good. And there can be many other rewards in working directly and full time for the public. These include, among others, freedom from pressure to bend one's values or distort one's conduct in order to meet a client's objectives (objectives the lawyer might not respect) or to "grow" a business, and freedom from the personal strains of private practice (e.g., longer and less predictable hours, uncertainty about sources of income, or the need to spend time generating new business and collecting old accounts). We just do not know whether, for sufficient numbers of the kinds of people the courts would want to serve as mediators, these kinds of offsets can compensate adequately for the lower salaries that staff mediators are likely to be offered in metropolitan jurisdictions.

My guess is that over time, as we increase our understanding of what it means to be "good" as a neutral in a court-sponsored program, and as experience working in neutral roles spreads in our communities, we are likely to be able to attract large numbers of well-qualified applicants for staff-neutral positions—despite salary obstacles. But to the extent that lower salaries impair the courts' ability to recruit the highest quality people to serve, the staff-neutral model may suffer in comparison to models in which neutrals are selected from the private sector and serve at market rates on a case-by-case basis or, ironically, models in which the neutrals are lawyers or other professionals who are employed full time in the private sector and who serve only occasionally, with little or no compensation, in a court's ADR program.

Closely related questions focus on the implications of particular models for a court's ability to secure the services of neutrals with desired subject matter expertise and breadth of experience. How important subject matter expertise or experience in particular kinds of cases is to a program will depend on a number of factors, including how analytically active the court wants its neutrals to be and the range and kinds of cases served. A court that elects to offer ADR services to a wide range of cases, and that wants its pool of

neutrals to reflect a roughly parallel breadth of experience, is likely to find the in-house model wanting. Under that model, budget constraints are likely to limit the staff of neutrals to a relatively small number of professionals. A small staff could not deliver subject matter expertise across a broad band of types of cases. The much larger pools of neutrals that are often used under models that rely on mediators who spend only small percentages of their time working in the court's program offer much greater opportunities to develop truly diverse panels.

On the other hand, subject matter expertise, or experience in particular kinds of litigation, will be appreciably less important (perhaps not important at all) to courts that embrace the purely facilitative model of mediation. Facilitative mediators are expected to be experts in generic processes—and are discouraged from offering evaluative inputs to the litigants. Courts that direct their mediators to limit their role to facilitation will find the staff-neutral model for delivering ADR services less limiting. These courts also may have less difficulty recruiting from the private sector—because professionals who offer only process skills and who do not use an evaluative approach in their ADR work may not command the income in the private sector that can be commanded by professionals who offer both subject matter expertise and an assertively analytical approach to their work as neutrals.

We shift gears here to identify a separate, probably less consequential consideration that also might affect a court's capacity to attract (and to retain) high quality neutrals: the level of protection the neutrals feel from unjustified lawsuits or disciplinary proceedings arising out of the way they carry out their duties as neutrals. This is another arena in which we know too little. We do not know how important it is to good neutrals to have a substantial amount of protection from suits and disciplinary proceedings.

Some might argue (I do not think very persuasively) that the promise of immunity (or other protections) would have a negative effect on the quality of neutrals and their performance—in part on the theory that it is the people who are not good at this work, or not morally disciplined, who seek these kinds of protections, and that, once in place, the protections encourage a dangerous moral or procedural laxity. It also is arguable that the people who are really good at and committed to this kind of work will not care much about protections of these kinds—because they will be confident that they do not need them. I am not so sure. My experience suggests that if the neutrals are lawyers who are serving as unpaid volunteers, or at below market rates of compensation, they are likely to worry at least to some extent about immunity. And if they are not full-time mediators (as most are not), they may worry

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about whether their insurance covers them when they are functioning in these nonrepresentative capacities.

If we assume that reasonable access to a meaningful level of immunity might contribute to the quality of the pool of neutrals, then using court staff as the neutrals may well offer advantages. Staff-neutrals are probably less likely to be sued, just because they are identified with the court, than neutrals who are not court staff.<sup>73</sup> And there may be less risk that courts would refuse to grant immunity to court staff than to neutrals who are not employed or otherwise paid by the court. While some state legislatures have adopted immunity laws that confer substantial protections on private lawyers serving as mediators,<sup>74</sup> there are a number of jurisdictions in which no legislation has addressed this issue.<sup>75</sup> And doctrine that would inform reasoning about the availability of immunity is not well developed—so neutrals in jurisdictions without legislation cannot proceed with great confidence.

The availability of immunity might turn, in some courts' views, on whether or not the mediator is performing judicial or quasi-judicial functions.<sup>76</sup> But the criteria for identifying such functions are by no means well developed. It is not clear, for example, that a mediator who is playing a purely facilitative role, who is engaging in no analysis or evaluation, who is making no decisions or recommendations (e.g., about case management, discovery, or motion practice), and who has no power, would be viewed as performing judicial functions (quasi or otherwise). The argument that the mediator who is playing a purely facilitative role is performing judicial

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<sup>73</sup> On the other hand, if staff-neutrals handle a much larger number of cases than neutrals under other models, there will be many more occasions for parties to be unhappy with the staff-neutral.

<sup>74</sup> See, e.g., COLO. REV. STAT. ANN. § 13-22-507 (West 1998); ME. REV. STAT. ANN. tit. 4 § 18-13(3) (West Supp. 1998); R. SUP. CT. ARIZ. 54(I); GA. ALTERNATIVE DISP. RESOL. R. VII.

<sup>75</sup> In the first comprehensive federal legislation promoting ADR in the United States district courts, for example, immunity is expressly conferred only on neutrals serving formally as "arbitrators"—and there are relatively few substantial arbitration programs under the authorizing legislation. See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2996 (to be codified in scattered sections of 28 U.S.C.). In particular, see 28 U.S.C.A. § 655(c) (West Supp. 1999), which expressly declares that arbitrators are "performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity." This statute says nothing about whether neutrals serving in federal court programs as mediators or neutral evaluators (or in any other ADR capacity) enjoy immunity from suit.

<sup>76</sup> See, e.g., *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994), *aff'g* *Wagshal v. Foster*, Civ. A. No. 92-2072, 1993 WL 86499 (D.D.C. Feb. 5, 1993).

functions may face additional obstacles when the mediator is not a lawyer. Fortunately, it is not clear that concern about immunity is deterring significant numbers of good people from serving as neutrals in ADR programs, but the fact that this issue would appear to provoke less concern when the neutrals are full-time court employees is a modest factor in favor of choosing that model.

### *B. Capacity to Identify and Select High Quality Neutrals*

There are significant differences between the models in the reliability of the processes they employ for identifying and selecting people with the requisite qualities to serve as neutrals. The most attractive model, measured by these criteria, probably is the staff-neutral. Courts adopting this model can exercise tight control over the selection process, after establishing clear and demanding measures of suitability. Under this model, a court (or a group serving as surrogate for or advisor to the court) will be called upon to hire only a small number of people—so it will be feasible to use a more labor-intensive and reliable selection process. That process can include background checks, perhaps two stages of interviews (the first, briefer, to cut down a larger group), and roll plays or observations. The hiring process also could include a period of probation—during which the court could move or remove candidates who failed to live up to the promise they appeared to have.

At the other end of this spectrum, the model that offers the least control over the reliability of the process by which neutrals are selected is the model in which the court sends the parties into the private sector to find their own neutral. Stated differently, it is under this model that the risk is greatest that people whom the court would not want representing it will end up serving. This is true even if the court limits the universe of potential neutrals to a pool that the court permits applicants to join only if they satisfy certain objective criteria. Unless those criteria are detailed and demanding,<sup>77</sup> this model offers much less control over selection of neutrals than the staff-neutral model.

Models that rely on occasional service by volunteers, or by people paid at well below market rates, may offer somewhat more reliable selection processes—especially if admission to the pool of neutrals is conditioned on successful completion of a court-run or monitored training program that weeds out unsuitable applicants, and if court staff who are familiar with the strengths

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<sup>77</sup> Such criteria might include, for example, successfully completing a specified, lengthy, and high quality training program, as well as a certain number of monitored (observed) mediation (or other neutraling) experiences.

and weaknesses of the members of the pool play a role in connecting neutrals with the specific cases in which they serve.

Generally, the larger the pool of people eligible to serve, the weaker the selection control will be. And efforts to substantially tighten selection quality control for larger groups are likely to be labor-intensive (therefore expensive).

The level of selection quality control under the model where the court relies on an outside institution to identify, train, and provide the neutrals obviously depends on the processes used by the outside institution.

### *C. Ability to Retain the Services over Time of People with the Best Profile of Qualities*

We turn next to questions about the courts' ability to *retain* the services of the neutrals in their programs. The importance of being able to retain the services of high quality neutrals will vary with the nature of the ADR program (e.g., the complexity or subtlety of the circumstances in the mediated cases, and how active or passive, socially and analytically, the mediators or other neutrals are expected to be), with how much the court invests (by necessity or election) in the training and skill development of the people who serve, with how long it takes the neutrals to sophisticate their craft (which will vary, again, with the character of the role to be played, as well as the kinds of cases and clients to be served), and with how plentiful the supply of appropriately qualified replacements is.

But the issue of retention will be of considerable moment to courts that believe that (1) the skills of their neutrals are critical to their programs being well respected and productive and that (2) developing refined neutraling skills and sensitivities requires substantial training and experience. So at least some courts are sure to conclude that it is important to retain the services of their neutrals for substantial periods.

The model I will examine most carefully with respect to this "retention" issue is the staff-neutral model. I focus in substantial measure on this model because I have found that thinking reliably about it is the most challenging. When I began addressing this question I felt that retention of high quality people would be a serious problem under this model—a view that I am now not sure is correct. For reasons I elaborate below, I am more optimistic about the capacity for people to sustain (over a substantial period) high quality service as staff-neutrals than I was when I started working on this Essay.<sup>78</sup>

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<sup>78</sup> Much of the development in my thinking about this issue is attributable to informal, unstructured interviews with the following lawyers whose views I respect and who have

Ability to retain the services of high quality neutrals under the staff-neutral model is a complex matter and could depend on a large number of variables, including the nature and purposes of the particular ADR program, the kinds of cases served, the roles the neutrals are asked to play, the level of pressure the neutrals feel to increase settlement rates or achieve other objectively verifiable results, the volume of cases the staff-neutrals are assigned, the mix of duties they are assigned, the degree of control or freedom the neutrals enjoy over important (to them) aspects of their work, how much intellectual and emotional nourishment is structured into the job, and salary competition from the private sector.

I began my consideration of this issue by examining my experience as a settlement judge,<sup>79</sup> and the experience of other magistrate judges in my court who devote considerable time to hosting settlement conferences. I am persuaded now that generalizing from judges to staff-neutrals might not be reliable, for reasons I will explain. But I also believe that I have gained some potentially useful insights through my work in this arena—and that courts who are considering the staff-neutral model should take into account some of the cautions that that experience suggests.

From personal experience, I have learned that work as a neutral in a process designed to explore prospects for settling civil lawsuits is emotionally and intellectually draining. A relentless diet of this kind of work can be exhausting—at least for a judge. In fact, this kind of work takes more sustained energy and attention, and is more emotionally taxing, than presiding over jury trials. During jury trials, there are periods when the judge is clearly not center stage—periods through which the judge can rest. But in a mediation, the neutral must always be “on.” A good neutral is always working, always at least actively listening, always a significant participant in the process dynamic.

And the work is not just with the neutral’s mind. Emotion can play a big role in mediations, and a mediator must acknowledge and work with emotion in a way that judges presiding over trials or at hearings rarely are called upon to do. Moreover, mediators work without the power of a judge and outside the environment of discipline that the courtroom creates, so mediators must work

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served for substantial periods as staff-neutrals: Robert Rack, Chief Circuit Mediator, U.S. Court of Appeals for the Sixth Circuit; Claudia Bernard, Circuit Mediator for the U.S. Court of Appeals for the Ninth Circuit; and Howard Herman, ADR Program Counsel for the U.S. District Court for the Northern District of California.

<sup>79</sup> During the 15 years I have served as a magistrate judge I have hosted somewhere between 1200 and 1400 multihour settlement conferences.

harder just to keep the dialogue civil and the behavior of the participants appropriate to the setting. Unlike judges who have the authority to accomplish something simply by ruling, a mediator can resolve nothing by herself—she understands that a mediation can produce a resolution only through an agreement between the parties, so she has a crucial added layer of challenge and work that revolves around inspiring and encouraging the parties to keep working toward a solution. Thus, a mediation makes demands on the neutrals for active social leadership and for tenacity that trials or hearings do not make on judges.

In addition, there can be a substantial amount of repetition in the character of the mediation process (even in the content of the problems, in some programs). Because the structure of the process can be similar in session after session, there is a risk that mediations can take on a ritualistic cast (in the mind and spirit of the mediator)—especially for neutrals who spend large percentages of their time doing this work. A mediator who works ritualistically will neither be effective nor respect-worthy.<sup>80</sup>

These are potentially dangerous combinations. There is a danger that a mediator who spends most of each day, day in and day out, serving as a neutral in contested matters will develop considerable fatigue—and might develop at least some process boredom. A staff-neutral also might develop thick, insensitive skin—either out of boredom or as a way of defending himself from the emotional stress that this kind of work can entail. Stated differently, there is a risk that staff professionals who are asked to do this kind of work on a full-time basis will suffer serious burn-out after just a year or two of

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<sup>80</sup> I may well be exaggerating the risk that full-time mediators will slip into ritual or will experience process boredom. Apparently there are mediators in the private sector who devote their full-time energies to this work and remain vigorous for years—although I suspect that most such people have a more varied diet of duties than a full-time mediator for a high-volume trial court would have. The few whom I know also devote substantial time to teaching other mediators—and often are involved in large, complex matters that require lots of reading and analysis between sessions (so they have good-sized breaks between the demanding mediation sessions themselves).

There are other factors that militate against a mediator developing process boredom. Mediation often is socially and intellectually complex and challenging, the parties are always new, and there often are dimensions of their situation that are unique. Moreover, thoughtful mediators can feel for many years that they are continuing to learn and continuing to improve in their craft. Robert Rack, for example, reports that he still continues to grow professionally, in significant ways, even after more than 15 years of service as a staff mediator in a federal appellate court. On the other hand, there are breaks from work as a mediator built into his job—as he also has responsibilities for some program design, training, and administration.

service.<sup>81</sup> And serious burn-out usually leads either to resignation or to a decline in the quality of the mediator's work.

A mediator who fails to bring both energy (subtle enthusiasm) and intellectual acuity to her work is likely to provide a much less useful service—and, perhaps more important, runs a real risk of committing serious professional error. A tired mediator may lose sensitivities; may listen and hear less; and may think more superficially, less reliably. More ominously, for a tired mediator, the perennial lure of impatience will be much harder to resist. A tired mediator will be tempted to cut too quickly to the chase (as she sees it), or even to aggressively pressure a party to agree to terms.

These risks are not figments of my imagination. I have suffered these pressures, experienced these fatigues, known these temptations, and, more than once, succumbed. When I have succumbed, I have felt ashamed of the way I have represented my court and the justice values for which it stands. On these occasions I have done a bad job as a neutral—hurting, rather than helping, the chances the parties otherwise had of resolving their differences. So these foreseeable stresses on the neutrals pose potentially serious problems—especially for courts that care deeply about the quality and integrity of the work that is done in their name.

While my skin may be unusually thin, and while my impatience fuse may be unusually short, I wonder how many people could do this kind of work well on a full-time basis for a sustained period. This concern is shared by other magistrate judges on my court who have done substantial work as neutrals in settlement conferences.

On the other hand, there are many differences between the circumstances under which settlement judges and staff mediators would work—and those differences may make generalizing from my situation to theirs unreliable.<sup>82</sup> A

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<sup>81</sup> This is yet another arena in which we need empirical research. And the studies should not be limited to simple statistics about turnover. We need, in addition, more subtle probes into whether time in the job causes full-time mediators to lose enthusiasm, to cut process corners, to become less open or sensitive, or to otherwise lower the level of their performance. If such declines are likely to occur, when (after how much time on the job) should we expect them? And does the incidence of this kind of problem vary with the kinds of cases or circumstances in which the mediators work? Or vary with the roles the mediators are asked to play (e.g., evaluative versus facilitative)?

<sup>82</sup> I am especially indebted to Robert Rack, Chief Mediator for the United States Court of Appeals for the Sixth Circuit, for alerting me to differences between the situations of a magistrate judge and a staff-neutral that might make generalizations from the one to the other unreliable. Mr. Rack reports that in his experience, which is largely with cases pending on appeal in the federal court system, staff mediators conduct initial mediation



judge has a host of other duties (that a staff mediator would not have) that add stress to the environment in which the judge performs her settlement work. For many judges, settlement work is not the center of their job, and time devoted to settlement negotiations represents time the judge has lost for other work—work on motions and trials and case management. And some judges are likely to feel that their work hosting settlement conferences does not really have to be done—whereas the work that they lose time to do while they are hosting settlement negotiations is work that must be done (e.g., ruling on motions). These feelings can make a judge feel extra strain when negotiations do not proceed efficiently.

Judges working in settlement conferences also may be more vulnerable than staff mediators to pressures from the parties' expectations. Specifically, many judges feel (sometimes because they are expressly told) that the parties expect the following two demanding things from them: (1) a clear and reliable analysis of the liability and damages dimensions of the case (an analytically powerful "evaluation" of the merits) and (2) the ability to get the parties to move, to press them to change their settlement positions so that the case will be resolved. Intellectually honest settlement judges know that they often do not know enough to reliably, or credibly, "evaluate" the case, and morally responsible settlement judges know that it is not consistent with their oath of office to pressure a party to settle. But the expectations of the parties (or their lawyers) remain—and those expectations can be an added source of pressure on a settlement judge.

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sessions in only about five cases a week. They spend the rest of their time in shorter follow-up sessions, reading and studying, and in administrative matters. Mr. Rack reports that this work profile is sufficiently varied to prevent the kind of burn-out that I write about in the text.

Mr. Rack has upwards of 20 years experience in his post, and his views and experience warrant careful attention. It is important to bear in mind, however, the context in which he has gained his insights. He works in an appellate court—and we cannot simply assume that the mediation dynamic there is comparable to the mediation dynamic at the trial court level. I suspect, for example, that the center of negotiation gravity in mediations at the court of appeals level is more often in matters of law, or matters of logical analysis, than it is in the mediations that take place in at least some kinds of state trial courts. I also suspect that the parties are represented by counsel in a higher percentage of cases he mediates than they would be in many state trial court programs. Moreover, Mr. Rack works in a federal court—so the universe of cases he mediates will likely be quite different from the universe of cases in many state trial courts, especially small claims courts, family courts, and criminal courts. And because he works in the federal system, the volume of cases he is expected to process may well be appreciably smaller than the volume of cases a state trial court would expect its mediators to handle.

At least in some programs, mediators who are staff-neutrals are less likely to be greeted with these kinds of expectations—and thus less likely to feel the strain that dealing with these expectations can cause.

There are additional reasons for which it might be dangerous to generalize from judges to staff-neutrals. Judges are not selected for their skill or aptitude as mediators, and it is not clear that many are drawn to the job because of a love of mediation. Nor are judges well trained in interpersonal dynamics or in techniques for psychological or emotional self-nourishment. Moreover, the modus that serves judges best in many of their other, more traditional roles is a modus that is counterproductive in a mediation. That is the modus of cutting as quickly and as crisply to the chase as possible—penetrating the verbal debris that accompanies many litigated matters in order to find the center of the dispute, or the analytical or evidentiary pivot on which the dispute turns. Because they spend most of their time in that mode, and because success in that mode pays high dividends in most of their work, judges can find it difficult to shift gears when they put on a settlement hat. Both the act of trying to shift gears and the need to keep other impulses in check can add strains to a judge who sits in a settlement conference that a professional mediator would not feel.

Judges, in short, are less likely than professional ADR neutrals to find fulfillment in the ADR process itself—and more likely to feel strain when there is no readily measurable “outcome.” All of these factors may make judges more vulnerable to feeling an exaggerated and quite misplaced sense of responsibility to “get the case settled.” That sense not only creates stress that a staff-neutral might not feel to the same degree, but also increases the risk that the judge will react to that stress in behavior that hurts the settlement dynamic as well as the public’s confidence in the integrity of the court system.

Conversations with staff-neutrals have alerted me to additional reasons why it might not be safe to draw conclusions from my experience as a settlement judge about how long other people might sustain high levels of engagement and performance in work as a full-time ADR neutral. Sophisticated thinking about how long other people might sustain work as a neutral probably requires careful attention to the roles of personality type and personal values. When I generalize from my reactions to settlement work, I generalize from a personality type that is essentially introverted. I have the kind of personality that feels drained and depleted by intense social interaction, at least if I feel some responsibility for the quality of that interaction. After a settlement conference, I feel emotionally empty—and I want to retreat to solitude so that I can recharge my social batteries.

## COMPARING STRUCTURES FOR DELIVERY OF ADR SERVICES BY COURTS

But people with extrovert personalities probably do not respond the same way. Rather than feeling depleted by a settlement negotiation, they may feel energized and enriched by it. They might be invigorated and fulfilled by the social dynamic in the ADR process—so that that process itself is both a source of sustenance and a motivator. For these personality types, the specter of more ADR sessions, especially mediations with their focus on social interactions, can be something to look forward to—a central reason to feel positive about continuing in a job. A staff-neutral with this kind of personality is likely to enjoy much greater longevity in the job than would an introvert—a fact the selection process can take fully into account.

Personal values and personality type are by no means necessarily linked<sup>83</sup>—but like personality type, personal values can play a significant role in a person's ability to sustain high levels of performance as a neutral. Different people experience a sense of fulfillment from different things. How long a person might be happy and productive as a staff-neutral could be a function, in substantial measure, of whether that person feels fulfilled by the values she is called upon to serve in her role as a neutral in the particular program. A staff-neutral who respects individual self-determination is not likely to find value fulfillment in an ADR program in which she is expected to pressure litigants to settle. But neutrals who work in programs that encourage them to pursue goals they deeply respect may find the pursuit of values they hold dear to be a source of commitment-sustaining energy. Some staff-neutrals I know feel a deep sense of spiritual reward in their work—both in its processes and its ultimate purposes.

The goals by which these neutrals are moved, and energized, include the goals of healing and building interpersonal connections, and the features of process that they find most rewarding include active, open, and empathetic listening; constructive self-expression; creativity in searching for common ground; and the sense of shared endeavor—of a joint effort to achieve the common goal of finding a basis for an agreement that all parties would find acceptable. These neutrals find meaning in the sense of community that attends a jointly undertaken effort, even when that effort ultimately does not yield a “solution.”<sup>84</sup> A person who is moved by these kinds of values, and who is

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<sup>83</sup> How much value a person attaches to things like creativity or sharing is not necessarily a function of personality type. There undoubtedly are a good many introverts who place great personal stock in the values described in this paragraph in the text—and a good many extroverts who could care less about them.

<sup>84</sup> It may be that ADR programs with certain features increase the likelihood that the neutrals will experience these kinds of satisfactions. For example, it may be that there is

expected to pursue them in her role as a mediator, is likely to survive much longer in her job than a person who feels no resonance in such values.

I also believe now that I underestimated, at the outset, how much capacity for longevity can be added to a staff-neutral's job by building certain features into it. For example, it may be possible to teach staff-neutrals how to perform their work in ways that permit them to "take care of themselves" (their emotional and energy needs) during the ADR process (e.g., during the mediation). Neutrals can be trained to handle their role in ways that reduce the likelihood that they will unnecessarily experience draining stresses caused by exaggerating their sense of responsibility and power, or by being pulled too far into an emotional struggle, or by permitting themselves to be baited or challenged into defensive or aggressive reactions. It also may be possible to teach neutrals how to release tensions, to decompress and to cleanse themselves emotionally after a highly textured mediation<sup>85</sup>—thus enhancing their ability to approach their next mediation assignment with the openness and engagement it will require. Apparently some social workers and mental health care professionals who spend substantial time in mediation-like settings have developed means for responding to these kinds of needs—so courts might be well-advised to look to these other professions for useful tools.

Another, more traditional way to enhance job longevity for staff-neutrals is to enrich their sense of professional growth through educational programs that help the neutrals develop or refine skills they know they regularly need in their work. Some of this kind of teaching can be done by professionals from outside the court. They could address ADR process expertise and pertinent substantive law, as well as communication skills and psychological sciences. Learning from experts in relevant fields from outside the law can be especially rewarding. Another vehicle for learning that can be especially useful is comediating, either with process experts brought in from outside the court, or with other neutrals from the court's ADR staff. Comediating with another sophisticated professional may be the best single device for extending a neutral's understanding of the process, enhancing her sensitivity to signals from the parties, and adding to the repertoire of responses on which she can draw to sustain a settlement dynamic.

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a greater likelihood that the process will be accompanied by a sense of shared purpose, and a constructive tone, in programs in which the parties come to the ADR session voluntarily—or, perhaps, after some kind of noncoercive pep talk.

<sup>85</sup> For example, one technique that may help achieve some of these ends is to find a very different subject, shortly after a mediation, on which to fully concentrate one's focus.

## COMPARING STRUCTURES FOR DELIVERY OF ADR SERVICES BY COURTS

There are three other features that courts could build into staff-neutrals' jobs that probably would extend longevity in these positions. The first consists of some—not necessarily extensive—diversity of tasks. Even limited diversion into other, less demanding tasks would reduce the risk of exhaustion. So asking the neutrals to do some of the administrative, training, and monitoring work that running a court program entails might be wise. Second, courts should include staff-neutrals in the creativity of program design, assessment, and reform. By involving the neutrals meaningfully in such work, a court capitalizes fully on their knowledge, motivates them to be more reflective about their work, and evidences a respect for their views and their ability to contribute that will make them feel appreciated, more responsible for the quality of the program, and more connected to the institution.

Finally, courts should try to structure the neutrals' jobs or roles so that they have some control over some elements of their work. The court might ask the neutrals, for example, to help identify which cases should receive ADR services, or to help identify the point in the cases' development at which the ADR session should occur, or to fix the pace or duration of the mediation efforts. Giving the staff-neutrals some control over such matters can be important to their self-respect as professionals, can enhance their sense of responsibility and engagement, and can create valuable opportunities for learning—for identifying ways to improve the process in individual cases or the design or implementation of the program as a whole.

While the list of job features that I have described in the preceding paragraphs might seem intimidating, we should not exaggerate the burden of building these kinds of features into a staff-neutral program. The teaching I described can and should be occasional, not constant, and several courts could pool resources to support it. Some outsiders can be persuaded to help the court without charge. And it would not be difficult to adjust job profiles to build in modest amounts of diversity and creativity—just a little of which might go a long way toward supporting the energy and tenure of the staff-neutrals.

Another way to reduce the risk of burn-out by staff-neutrals would be to make their positions only part-time, so that no one would be called upon to work in this capacity on a full-time basis. Thus, if a court needed the equivalent of three full-time mediators, it could consider hiring six people on a half-time basis. A court that considers this option, however, faces some complicating factors. First, the court would have to develop thorough and precisely framed conflict of interest rules—so that people who might be interested in working part time for the court and part time in the private sector would know what kinds of private work they could accept and what kinds they would be required to turn away. If the court permitted its part-time neutrals

to have a private law practice or a private mediation practice in tandem with their public employment, the court also would be well-advised to take special steps (through public pronouncements and rules) to assure the public that the court's mediators were not using their public work as a base for building their private practices. Finally, with its proposed conflicts rules well publicized, the court should do some probing of the market to be sure the court could attract people with the requisite qualities and experience to part-time positions that were accompanied by possibly substantial restrictions on outside work.

Having explored these issues at some length, I end up not being sure how great the risk is that full-time staff-neutrals will burn out after only a couple of years on the job—and either quit or suffer a serious drop in the quality of their work. The occasion for concern would seem most obvious in courts that would expect their staff-neutrals to play an assertive and evaluative role and that would call upon them to serve, on a constant basis, a high volume of intellectually or emotionally demanding cases in a narrow band of subject matters or circumstances. But the decision is not clear cut even for courts who would put their mediators in that kind of environment—in part because there are a large number of other positives about the staff-neutral model, and in part because there also are challenges to retaining the services of high quality neutrals in many of the other models.

For example, there are potential difficulties (with different sources) retaining high quality neutrals under the models that rely on occasional service by unpaid volunteers or by people who are compensated at well below market rates. One risk is that neutrals who are involved in ADR sessions only occasionally will lose interest, will become emotionally or philosophically disengaged and drift away—and either remove themselves from the roster or perform poorly or perfunctorily. Another source of risk to retaining neutrals under these models is competition from the neutrals' "real" work—their private practices (e.g., law, psychology, counseling, or mediation) or the other job on which their income depends. For occasional neutrals, the commitment to the court is something that can be sacrificed if the pressures from their other world become too great.

Another related source of risk under these models is the lure of private ADR work for which the neutral is paid at full market rates. This problem is most acute for the best neutrals—it is their services that the private sector is likely to demand most vigorously and to pay for most handsomely. If the demand in the private sector for high quality neutral services continues to grow, courts using these models might face substantial difficulties retaining the services of their best neutrals.

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I hasten to report, however, that none of these potential sources of difficulty has caused serious retention problems in the ADR program in the Northern District of California, which relies heavily on occasional pro bono service by a large cadre of court-trained private attorneys. While we have lost a few neutrals from our panel over the years to “drift” or to competition from their “real” (paying) work, the vast majority of our neutrals find sufficient nonfinancial reward in this form of public service, and in the break from the advocate’s role, to remain on our rosters for many years. We also take visible steps to keep our occasional neutrals feeling valued and involved. We sponsor regular in-service trainings, we invite experienced neutrals to participate in round table discussions organized around specific subjects or kinds of cases, and we involve many of our neutrals in our on-going efforts to evaluate and improve our programs, as well as in the trainings we sponsor for new neutrals and the educational programs we conduct for users of our ADR services.<sup>86</sup> In addition, the court invites all its neutrals to a formal reception every few years, where we acknowledge their public service and present certificates of appreciation.

A court that relies on an outside organization to orchestrate the provision of ADR services by neutrals who serve only on an occasional basis should be sure that organization takes steps to address possible retention problems. Retention problems could be more severe under this model than under the model where the court itself orchestrates the delivery of the services—at least when most of the neutrals are lawyers—unless the neutrals have some additional, commitment-sustaining connection to the outside organization.

Retention problems also can afflict programs in which the court pays private mediators or firms to provide the neutral services—unless the court can pay virtually full market rates.

I have no basis for assessing the severity of the “retention” problem under the model in which the court sends the parties into the private sector to hire their own neutral. I have no idea how stable the “stable” of private providers might be under this model—but I assume the answer would vary, perhaps considerably, from place to place and between various sub-specialties within the larger world of ADR providers. (It would not be surprising if the stability

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<sup>86</sup> For example, over the years we have involved lawyers on our panels in developing special protocols or approaches for intellectual property cases, in refining the ENE process, in tightening the administration of the arbitration program, in developing ideas about how to respond to ethical dilemmas or process problems that surface repeatedly during mediations, and in refining conflicts of interest rules. We also regularly involve a good many of the lawyers on our panels in the trainings we sponsor for new neutrals and for the users of our ADR programs.

of the pool of family law neutrals, for example, was different from the stability of the pool of neutrals for intellectual property cases.)

#### *D. Performance Enhancing Incentives*

Which of the models we are comparing offers the neutrals the greatest incentives to high quality performance? In which model are the neutrals likely to give most of themselves to the ADR effort and to care most about how well they do their neutral job?

Is a staff mediator likely to feel greater incentives to do her job well than a mediator who is not on the court staff? Or is a person who is not on the court staff, but who looks to paid work as a mediator as a significant source of income, likely to have greater incentive than a staff mediator to perform well? Or are incentives to perform well likely to be greatest among civic-minded volunteers—people who serve simply because they believe in the work, people who serve without pay and without any expectation that work as a mediator will represent a significant source of income?

I know of no reliable empirical answers to these questions—so we are constrained to identify factors that might get some play in the ultimate equations. As I have worked my way through these factors I have gravitated toward the view that performance enhancing incentives are likely to be greatest in the staff-neutral model. Several considerations support this tentative conclusion. The first focuses on the closeness of the connection between the neutrals and the court. As I suggest in the next section, this closeness can be a source of role-distorting pressures, but it also can be a source of a good many emotionally powerful positive forces. Full-time staff-neutrals are likely to have a greater investment in the quality and success of a court program than neutrals serving in any other capacity. Their tenure in their positions, and thus their income, depends on how well they perform.<sup>87</sup> Perhaps as important, their sense of self-worth and their professional self-respect turns fully (not marginally) on the quality of the service they provide. Because they are likely

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<sup>87</sup> As I discuss in the next section, there also are serious potential downsides to a mediator believing that her job security depends on how well she performs—at least if she is afraid that the court that employs her will crudely measure her success by the rate at which “she” “settles” cases that she mediates. A more sophisticated court appreciates, of course, that no mediator ever settled a case—only parties settle cases. And, hopefully, many courts will be sure to make clear to their mediators that what they care most about is the quality of the process the mediator helps orchestrate, not whether that process yields a settlement.



to identify most with their program, they also are likely to care the most that the parties and the judges perceive the work they do as valuable. And the desire to have the parties value the work they perform can drive staff-neutrals to behave in ways the parties respect and that are responsive to the parties' values and needs. Stated more succinctly, full-time staff-neutrals are likely to have the greatest ego-investment in the quality of the ADR program. And, other things being equal, the people with the greatest ego-investment in a program are the people likely to bring the most energy and effort to their work.

Staff-neutrals not only are most motivated to earn positive feedback from program participants and judges—they also are positioned to have the best access to feedback, to be most aware of it—and thus to learn most from it and use it most to improve their performance. Moreover, a court's ability to monitor the behavior of its mediators is greatest when the mediators are full-time employees. Enhanced ability to monitor can be accompanied by enhanced ability to encourage, by praise and reward, desired behaviors—as well as enhanced ability to detect and discipline behaviors that are not desired.

The closeness of the connection between the full-time staff-neutrals and the court can be a source of another, related set of forces that can drive staff-neutrals toward positive behaviors. People who work full time for the court are more likely than others to be infected thoroughly by the values that drive and dominate the justice system: integrity, impartiality, fairness, fidelity to widely endorsed societal norms, and public service. When one works full time in a court, one's environment and mission push one to view justice as the client. And when one believes that justice is the client, one is inclined toward behaviors that generate respect. In addition, when one works full time in a court one absorbs the importance of judicial temperament and demeanor—one observes up close, and often, the respect that judges who behave respectfully and appropriately earn, and one feels the disrespect that judges suffer when their conduct deviates from these norms. In these and other ways (including formal indoctrination and job requirements), courts have appreciably greater capacity to infect with justice and service values those mediators who work full time as employees of the judiciary than those mediators who work primarily outside the court system.

There is one kind of incentive with respect to which the staff-neutral model might not be as attractive as some of the others. In the staff-neutral model, the amount of money the mediator is paid does not vary with how well she performs. In two of the other models, the lure of greater income and the risk of income loss could play motivational roles. This factor could be at play under the model in which the court pays private neutrals (or firms of neutrals)

to provide the ADR services and in the model under which the court directs the parties to choose (and pay at market rates) a private neutral from a roster the court has approved. In these two models the amount of work the neutral gets could depend in part on how well the neutral performs. But I suspect that the real power of this kind of economic incentive lends itself to exaggeration. The rates that courts will be able to pay neutrals often will fall below true market values—a fact that would dilute what otherwise might be more powerful economic incentives in the model in which the court pays private neutrals. And many courts that use the model in which the parties are required to pay the market rate fees of the neutrals maintain very large rosters of potential service providers—so most persons on those rosters could not realistically expect to be chosen often enough to generate a substantial portion of their income.

Outside the arena of economics, the incentives to high quality performance might vary considerably among the non-staff-neutral models—but in none would the private neutrals have the same level of ego-investment in the quality or success of the court's program as would full-time employees of the court. The sense of identification with the success of the court's program would seem most attenuated when an outside organization orchestrates the provision of the ADR services and when the court simply directs the parties to pay a neutral they select from a long list maintained in the clerk's office. Under these models the risk may be greatest that the neutral's performance will be perfunctory.

I hasten to add, however, that our court (the Northern District of California) has had a very positive experience with the energy and commitment that volunteer mediators can bring to their occasional work as neutrals. Many of our volunteers are prepared to give many hours of their time, without pay, to a single case—precisely because they do this work only a few times a year. Many come to the work of neutraling with a freshness and a commitment that is invigorating. Because they spend most of the rest of their time being advocates, or in settings in which their objectives are not fully unassailable, they really enjoy putting on their neutral hat and playing a role that is designed to be wholly constructive. They are energized by the opportunity to help other people—especially by the opportunity to help other people avoid some of the pain and expense and strain that they know (all too well) often accompany formal litigation. So they usually give a lot of themselves—trying hard to provide the litigants they serve with valuable assistance. And because they are bright and knowledgeable, the work they do

usually is well received by the parties.<sup>88</sup> What is less clear, as I discuss in a later section, is how closely they are able to follow procedural protocols and how sophisticated their tools are for maximizing the productivity of their ADR sessions and for responding to problems and to ethical dilemmas.

### *E. Role-Distorting Pressures*

The vulnerability of neutrals to role-distorting pressures appears to vary considerably among the models we are comparing.

Before turning to that comparison, it is important to emphasize that, cutting across all models, one of the most dangerous possible sources of such pressures is the court itself. Under every model, judges and court administrators will create pressures on their neutrals to misbehave, most obviously by pressuring litigants to settle, if the judges and administrators insist simple-mindedly on measuring the success of their ADR program *only or excessively* by the incidence and timing of settlement. I explore this point first in the context of the staff-neutral model.

As discussed above, mediators (and neutrals in other ADR processes) who work full time in a court are likely to care more about what the judges and court administrators think of the way they perform than mediators who are not full-time employees. Whether this fact encourages positive or negative behaviors by the court-employed mediators depends on which values they believe are most important to the judges and judicial administrators. If they believe that values that revolve around process integrity are most important to the judges, the proximity of these mediators to the judges, and their desire to please the judges, will operate as an important force promoting high quality service.

On the other hand, if the mediators believe that process values are less important to the judges than increasing the incidence of settlement, then proximity to the judges and a desire to please them could leave staff-neutrals especially vulnerable to role-distorting pressures. This is a real risk—with potentially very serious negative repercussions. A mediator who is a full-time employee of a court is more vulnerable than at least most other mediators<sup>89</sup> to pressure from judges to get cases settled. The employee-mediator is more likely to feel that the judges are watching—and if the employee-mediator

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<sup>88</sup> See STIENSTRA ET AL., *supra* note 6, at 192–193, 206–208.

<sup>89</sup> A mediator nominally in the private sector who felt dependent on a steady or growing stream of referrals from a court might be just as vulnerable to pressures of this kind.

believes that what matters most to the judges is getting settlements, the mediator also is likely to fear that the judges are keeping a crude accounting of settlement rates. A mediator who believes that her work is being judged by such measures might succumb to the temptation to cut ethical or process corners to try to increase the number of agreements produced through her mediations. She is more likely, for example, to resort to manipulation, or even to overt pressure on parties. These kinds of behaviors will promote disrespect for the court as an institution and for the law generally.

Because the risk just described is real and potentially dangerous, courts that decide to hire full-time mediators should go to considerable lengths to make sure that their staff-neutrals understand that *process integrity* is much more important to the judges than anything else, including, specifically, settlement rates. Without being explicitly reassured about this, staff mediators might assume that their core responsibility is to maximize the number of settlements—that the judges hired them to reduce their work load or backlog and that the only way to achieve these ends is to increase the settlement rate. Court employees who are not unequivocally disabused of these assumptions could cause great harm to the public's confidence in the court system by, among other things, pressuring litigants to accept settlements they do not want to accept.

Maintaining the confidentiality of ADR proceedings may be another arena in which staff-neutrals are more vulnerable to pressures from judges. As I mentioned earlier, there is anecdotal evidence from programs in Ohio that the likelihood that there will be inappropriate communication between the neutral and the judge is greater in programs in which the neutrals are full-time employees of the court than in programs in which the neutrals are drawn from pools of otherwise privately employed professionals. Administrators of ADR programs in Ohio have developed concerns about judges engaging in inappropriate communications with staff mediators—as judges are keenly interested in the status of cases assigned to them and are not always sensitive to the confidentiality rules. This points to the need to be vigilant in educating judges about the special policies and rules that have been developed for ADR programs.

There would appear to be less risk under the other models that perceived pressure from the judges, or a misplaced desire to please the judges, could lead to bad practices by neutrals. Neutrals who serve only occasionally, or who are not dependent on work sent from the court for significant portions of their income, are not likely to care as much what the judges think—and are not as likely to know what they think. Remoteness is their protection. Similarly, neutrals whose service is provided through an outside organization

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will likely feel more insulated from potentially process-corrupting judicial pressures—unless the outside organization uses only settlement rates to measure the value of the work it provides.

The volume of cases that the neutrals are expected to handle is another potential source of role-distorting pressure. Neutrals who are required to service an unreasonably large volume of cases might become impatient, abandon their listening skills, or resort prematurely and crudely to pressure tactics in an effort to “efficiently” push the parties to settle—or at least to get to their “bottom line” settlement positions. There also is a risk that neutrals who are forced to service too many cases will react in the opposite way—by retreating into passivity and giving up on the negotiations too early—in order to conserve their resources for the cases that remain, perennially, in line.

I suspect that the staff-neutral model is the most vulnerable to the court assigning an unrealistic volume of work. Under that model the court might feel that it can be most demanding because the court’s resources, which could otherwise be committed to other court work, are being used to pay directly the full salaries of the neutrals. The model which is next most vulnerable to this problem probably is the model in which the court pays the fees of private neutrals.

Another potential source of role-distorting pressure is money. A neutral who is paid by the hour might be tempted to move more slowly than the circumstances justify, or to keep the parties in negotiations even after it is clear that nothing productive could be accomplished. It is not clear that this kind of risk has developed into a significant problem in any program—and it would appear to pose a real threat only when the hourly payment the neutrals receive is at or near true market rates. Neutrals who could find more lucrative ways to spend their professional time are not likely to artificially extend an ADR session.

When the neutrals are not paid at all, or when they are paid at well below market rates, the money factor could distort their service in the opposite direction. They could be tempted to give the ADR session and the parties short shrift. As I reported above, this problem has not surfaced in any substantial way in the Northern District’s program (which relies largely on unpaid volunteers), in part because we ask our neutrals to serve only occasionally. I suspect that the risk of “under-service” by the neutrals is greatest in programs that simultaneously underpay and over-demand—i.e.,

when the neutrals are paid, but appreciably below market rates,<sup>90</sup> and when the court requires them to service a substantial volume of cases.

#### *F. Capacity to Develop and Retain Refined Process Skills*

We turn at this juncture to another important issue: are there significant differences in the capacities of the different models to develop refined process skills in neutrals, or in capacities to assure that such skills, once learned, are not lost? I believe that the answer to this question very likely is yes—and that the staff-neutral model offers significant advantages in this important arena over at least most of the others.

I begin my exploration of this question by describing some of my concerns about our program in the Northern District—where the vast majority of the neutrals are private lawyers who have active litigation practices and who serve only a few times a year, almost always on a pro bono basis. These lawyers are experienced litigators who are bright and who have appropriate temperaments. But they usually come to us with little past experience as a neutral in ADR—and even after they join our panel of neutrals they usually devote only a small percentage of their time to working in that capacity. They remain, primarily, litigators.

When we admit lawyers to our panel we require them to complete successfully a fairly substantial training course—which involves at least some role play and gives our trainers a chance to assess, at least superficially, how well they have learned the fundamentals of the particular ADR process that is the subject of the training. But the training is in no sense exhaustive, and we impose no requirement that our new admittees observe some real ADR sessions, or cohost some such sessions, before we permit them to take on their first case. Perhaps as significant, there often is a gap of several months between the time they complete the training and the time they receive their first ADR assignment. Then there usually is a gap of several more months between their first and their second case.

This system suffers from some substantial pedagogical limitations<sup>91</sup>—and I worry about whether it is capable of imparting process skills that are

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<sup>90</sup> The risk that the neutrals will devote insufficient time and energy to their work also could attend a program that paid the neutrals not by the hour, but by the case—if, under the per case rate, neutrals who devote an appropriate level of effort to the ADR sessions end up with compensation that is well below what their time would otherwise be worth.

<sup>91</sup> The significance of these limitations depends in some measure on assumptions one makes about how difficult it is to be good in the neutral role—about how much training one

sufficiently sophisticated and sensitive. Our neutrals' learning is not compact and is not very deep. And we have little control over its reliability. The gap between the initial training and the first assignment as a neutral, and the subsequent gaps between opportunities to serve, mean that our volunteer neutrals do not have a chance to compare processes in close temporal proximity. Nor are they exposed, through volume of service, to as many of the problems and obstacles to productive mediations that full-time mediators see—and from which their full-time counterparts learn and refine their craft. Stated simply, they have substantially fewer opportunities to practice. So they have fewer chances to identify the approaches and techniques that work best for them, to develop the capacity to detect sources of difficulty in the process or of concern to the participants, and to experiment with ways of responding that build the parties' trust and that improve the likelihood that the mediation will be productive.

Our volunteers also are not anywhere nearly as well suited as staff professionals to be observed in their work and to be taught—by program directors or by one another. They perform their neutral services for the most part outside the court—so the program directors have little opportunity to give them direct feedback or to make suggestions. Nor do other neutrals have an opportunity to observe their work. And while our program directors have built in some opportunities for focused training programs and for exchanges of experiences and insights through informal breakfast and lunch meetings of groups of our volunteers, these opportunities are no match for the regular learning and teaching that staff-neutrals can provide for one another. In sum, our volunteer neutrals are at a substantial learning disadvantage, compared to staff-neutrals, both through direct experience and through education by others.

In combination, these circumstances mean that in some measure our neutrals must reinvent their procedures each time they serve. The months between mediations create a risk that our neutrals will forget some of what they were taught when they were trained and will fail to follow procedural protocols. These gaps also create a risk that our neutrals will make process errors, or respond badly to developments in the sessions with the parties, thereby not only reducing the quality and value of their work, but also harming the reputation of the program and confidence in the court. These risks are not limited to our program—they would arise under any model that

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needs, about how subtle and demanding the particular ADR process is. These are questions that I addressed early in this Essay—and that do not admit of answers that are either easy or necessarily the same in all program contexts.

relied on occasional service by people who do not commit substantial portions of their time to comparable kinds of work as a neutral.

In sharp contrast, learning by staff-neutrals can be faster, more efficient, deeper, and more reliable.<sup>92</sup> A very compact learning environment permits staff-neutrals to more quickly develop sophisticated process skills and sensitivities. Constant use of those skills reinforces lessons learned and virtually eliminates the risk that the neutrals will forget procedural protocols or make the kind of serious errors of professional judgment that can cause substantial harm to the public's confidence in a court's program. So, compared to our occasionally serving volunteers, it is likely that how staff-neutrals go about their work is more predictable, more reliable, and more sophisticated.

How other models fare in comparison to staff-neutrals depends in part on how frequently the neutrals serve, either in the court's program or in process-parallel settings, and on how tightly their education and training are controlled.

To reduce some of the risks I just described, courts that send parties into the private sector, or that pay private mediators to service their cases, or that have an outside organization arrange the neutrals' service, should impose at least minimum training, experience, and frequency of service requirements. Even when sponsoring courts build in such requirements, however, no other model is likely to provide neutrals with more compact, deeper, and more reliable learning than the staff-neutral model.

### *G. Performance Quality Control: Capacity, Efficiency, and Regulatory Reach*

In the preceding sections, we have examined some of the forces and factors that could affect the level of risk, under the various models, that neutrals will deviate from performance expectations. As we have seen, the magnitude of this risk appears to vary a great deal from model to model—but there can be no doubt that this risk is real and, under some models, sizeable. One of the more troubling things I have learned over the years that I have been responsible for our court's ADR programs is that neutrals ostensibly performing the same role (e.g., as a mediator) more than occasionally do not follow the same procedural protocols. Instead, a wide range of procedures

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<sup>92</sup> By "reliable" I mean, in this setting, learning that the neutrals are likely to retain and that is likely to guide their conduct each time they play the neutral role.



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have been used<sup>93</sup>—all given the same name (e.g., “mediation”). So even some major features of what the “mediation” process consists of can depend, too much, on who the neutral is and what her individual understanding of “mediation” is.

These facts make the issue of “performance quality control” important. Every court must know what is being done in its name. No responsible court can place its imprimatur on, and send parties off to participate in, proceedings whose elements and basic character are unknown or out of control. Parties have a right to know what they are getting into. They need to tailor their preparation for the ADR session to the specific character of the process—and we can expect the ADR sessions to be less useful, and less appreciated, if there is a difference between the procedures the parties think they will encounter and the procedures the neutral actually employs. Another reason that it is important for the neutrals to follow predictable (and prescribed) procedural protocols is that judges cannot make reasoned decisions about whether to refer cases to a particular ADR process unless they know what the content of that process actually will be—and unless they can reliably predict how that process will differ from other processes that they might consider. It follows that the essentials of processes that have the same name must be the same in fact.

For all of these reasons, it is important to compare the ability of the models to deliver predictable behaviors by their neutrals. And an important part of this comparison is an assessment of the likely costs of delivering that predictability. In essence, our inquiry here is into the politically charged arena of “regulation”—and we must ask not only about the capacity to regulate

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<sup>93</sup> We encountered one of the more disturbing illustrations of this problem when we were conducting a training of “arbitrators” for our court-sponsored program under the then-current version of 28 U.S.C. §§ 651–658 (1994). (As noted earlier, this statute was revised in late 1998—and is now part of the broader Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998).) Shortly after we had commenced this particular training session one of the most senior members of our panel raised his hand and said, in effect: “Why are we going to spend all this time being trained in your arbitration procedures? I already know what arbitration is. It is just a settlement conference with another name.”

This statement was made years after Congress had passed a set of specific rules governing the procedures for the court-annexed arbitration programs in federal district courts—procedures that made (and still make) arbitrations in these settings vastly different from “settlement conferences.” See the Judicial Improvements and Access to Justice Act of 1988—which, until October of 1998, comprised 28 U.S.C. §§ 651–658 (1994).

under each model, but also about the price tag (in money and bureaucratization, among other factors) of an effective regulatory system.

Pursuing these questions, our first observation is about differences in levels of risk that a court will lose touch with, or track of, what is being done in the name of its ADR program. The model in which the ADR services are provided directly by full-time employees of the court creates the least risk that the court will not know what its ADR neutrals are doing. Staff-neutrals are most likely to do their work in or near the courthouse, are easiest to observe, and can be debriefed most readily (and least offensively) by a program director or supervising judicial officer. Moreover, an ADR program that relies on full-time employees to deliver the ADR services is likely to involve the fewest number of neutrals. Simply stated, it is easier to keep track of what a small group of employees is doing than a large group of persons who perform their work in a myriad of settings, most of them at some distance from the courthouse.

The greatest risk that the court will lose touch with what is being done in its name arises under the models that involve large pools or lists of neutrals with attenuated connections to the court. The model that is most vulnerable to this problem is the model in which a court sends parties into the private market to find and pay their own neutral. It would only be by expending considerable resources monitoring and regulating the neutrals on an approved list that a court using this model could be reasonably confident that the neutrals were adhering closely to prescribed protocols and rules.

Courts that rely on large groups of volunteers<sup>94</sup> who serve only occasionally face a quality control challenge of similar magnitude. It would be extremely difficult and expensive to regularly monitor or meaningfully debrief the many neutrals who serve in these programs. And because the people who serve as the neutrals in these programs usually are accomplished professionals in their own right, at least some of them might not react well to being monitored or debriefed on a regular basis.

There should be somewhat less risk that the court will "lose touch" under models in which the court pays neutrals it has screened—at least if those neutrals are professionals who regularly commit substantial percentages of their time to ADR work. Courts that delegate responsibility to administer their ADR program to an outside organization are dependent on the tightness of the controls that organization maintains.

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<sup>94</sup> For purposes of this discussion, there would be no meaningful difference between models that rely on unpaid "volunteers" and models in which the neutrals are paid (by the court or the parties) well below market rates—but serve only occasionally.

As these comments suggest, there are several major components of an effective system for maintaining a high level of performance quality control: attracting and selecting high quality people to serve; training them well; monitoring their work “in the field”; establishing systems to acquire feedback (primarily from the parties and their lawyers, but also from other neutrals, from program managers, and from ADR teachers) about how well the neutrals performed; funneling that evaluative feedback to the neutrals; and re-educating or disciplining neutrals whose performance falls short of established standards.

It is persuasively arguable that virtually all of these functions can be performed most effectively, at the least cost, and with the least intrusion into the private sector when the neutrals are full-time employees of the court. Conversely, the larger the group of neutrals, the more diverse their backgrounds and inclinations, and the more attenuated their connection to the court, the more difficult and expensive it will be to establish effective systems for training, monitoring, and disciplining their performance. Moreover, when the pool of neutrals is large and drawn from the private sector, achieving real performance quality control is likely to involve the court in the most burdensome and intrusive regulatory effort.

The first component of a good quality control system, of course, consists of enlisting the services of high quality people to serve as the neutrals. I already have discussed the different capacities of the models to attract and identify the people with the most promise as ADR neutrals. It is worth repeating here, however, that without good “screening” for high quality people at the front end of the system, the “base” on which the rest of a quality control system would operate would be unreliable. And that unreliability could compromise, seriously, the capacity of the rest of the system to achieve its goals. It also is worth repeating that while it is not clear that the staff-neutral model enables the court to attract the people with the most talent, that model does offer, clearly, the most reliable screening of candidates—and so creates the least risk, by far, that someone who is likely to make serious errors, or to embarrass the court, would end up serving.

It also is clear that training and monitoring are likely to be least expensive and most effective under the staff-neutral model—as are systems for acquiring feedback from participants and for making sure that feedback actually reaches the neutrals and affects their job performance. Similarly, detecting instances in which neutrals “stray” from prescribed procedures or violate rules is easiest under the staff-neutral model. Imposing discipline also is easiest under this model—as long as the discipline called for is not severe.

As noted earlier, responding effectively when there is a need for severe discipline might be appreciably more difficult when the neutral is an employee

of the court than when the neutral is not. Firing a staff-neutral could be legally difficult and time-consuming, and it could take substantial time to replace a fired staff-neutral. In sharp contrast, removing a poorly performing neutral is likely to be much less disruptive to a program, and much less difficult (as a matter of sociology and as a matter of law), if the neutral is one of many people in a large pool of private persons to whom ADR work is only occasionally referred. While removing a person from such a pool "for cause" will not be painless,<sup>95</sup> and should be done with appropriate levels of procedural fairness, there are fewer emotional and legal obstacles to initiating and completing such a removal process with a person who is not an employee of the court or whose livelihood does not depend on referrals from the court.

Finally, there is the controversial matter of public "regulation." When the pool of neutrals is large and comprised primarily of persons who are not full-time court employees, there is likely to be a greater need to establish regulations not only about how the neutrals perform their work, but also about the circumstances in which they may serve (e.g., qualifications, conflicts of interest, or availability), the consequences to them and to others of serving (e.g., preclusion from accepting employment of specified kinds or from certain parties after they have served),<sup>96</sup> and the economic arrangements that attend their work (e.g., how much they may be paid or by whom). It is likely that the difficulty of developing regulations whose content and reach is sufficient will vary directly with the number and diversity of the circumstances of the people who serve as neutrals. Figuring out what the rules should be for a small group of staff mediators is likely to be much easier than figuring out what the rules should be for a large, heterogeneous group that includes people with a wide range of other professional and economic involvements and interests.<sup>97</sup> And after the regulations are developed, the job of enforcing them

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<sup>95</sup> Generally, I would expect the difficulty of removing a neutral from a panel to vary with length of time the person has been serving as a neutral for the court and the extent to which the person reasonably has come to depend for a significant percentage of her income on referrals from the court's program.

<sup>96</sup> The opinion in *Poly Software International v. Datamost Corp.*, 880 F. Supp. 1487 (D. Utah 1995), suggests the difficulty even of figuring out how to think, reliably, about conflicts of interest in these kinds of settings. Chief Judge Winder's examination of the conflict of interest issues is one of the most sophisticated in a reported decision—and exposes some of the challenges that "regulators" face when they try to craft rules for neutrals who are employed primarily in the private sector.

<sup>97</sup> Some courts may elect to reduce these kinds of burdens on themselves by delegating responsibility for at least some aspects of regulating neutrals to another institution—e.g., a nonprofit foundation or bar group, or to an association of professional neutrals. Before

will require more resources and personnel, and will inject the public further into the private sector, under models that rely on large numbers of neutrals who are primarily employed in the private sector.

### VIII. THE MOBILE AND MULTIPLE “BOTTOM LINES”

Like some parties who attend mediations without understanding the principles of the process, readers who are looking for crisp directives and an uncomplicated argument for the superiority of a single model for delivering ADR services will be disappointed by this Essay. It is quite likely that no one model is superior in all settings—even for those who are willing to limit their vision to the values on which I have focused. The “bottom line” of our inquiry is mobile—likely changing with a host of assumptions and variables, as well as with the specific context in which that bottom line is sought. Among the many pertinent factors, it is especially important that we attend to the prioritized purposes of the particular ADR program, to the kinds of cases and parties to be served, whether participation is mandatory or voluntary, whether the parties are represented by counsel, the volume of cases the system will be asked to accommodate, and the role the court wants the neutrals to play.

We also must emphasize the role that “guessing” plays in our thinking about these matters. There is little or no empirical foundation for most of what I have written. Until rigorous research lays a sound foundation for policy decisions in this arena, it is especially important that we remain open and flexible—committed to learning as we go and to making changes in our systems as we learn. It follows that we need to be careful not to get so rigidly committed to any given model that we cannot make adjustments if clear reasons for shifting gears emerge.

It is at least comparably important, however, not to permit the elusiveness of full confidence in our choices to lead us to stasis. Because we know that ADR is capable of delivering much of value to litigants in some circumstances, we should push forward—perhaps less ambitiously than we might otherwise—but forward. It is in that mode that we might consider the

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delegating any such responsibilities, however, a court would have to review carefully (and approve) the content of the other entity’s regulations and its systems for monitoring and enforcement. Such a court also would have to set up a system to review or audit periodically the way the “partner” institution was meeting its responsibilities—to be sure that unacceptable changes were not made and that there remained a sufficiently tight connection between promise and reality.

following out-of-context suggestions about the pros and cons of the models we have been asked to compare.

I have been surprised, as I have worked through this material, by the number of important values with respect to which the staff-neutral model seems to be the most attractive. Before recapping those values, it is important to emphasize, however, that I have no clear idea, most of the time, about *how much* better this model is than at least some of the alternatives—or how much difference particular considerations make to users of ADR systems.

It follows that there is a risk that a long list of values with respect to which the staff-neutral model appears superior (again, out of the context of any specific program) could be misleading. If this model turns out to be only marginally superior in many of these areas of comparison, the list could overstate this model's attractiveness—especially if the values with respect to which a competing model is clearly more attractive are very important to the sponsoring court. For example, if a particular sponsoring court believes that providing ADR services to a large number of cases is extremely important, or that public confidence in the system would be seriously jeopardized unless the pool of neutrals was large and very diverse, the fact that the staff-neutral model offers advantages with respect to many other values might not be all that important—if those advantages turned out to be relatively modest. All this is to say that the important judgments here can be subtle and must be made independently by each court or court system—according to the value hierarchy it has established for itself.

Bearing all these cautions in mind, I suggest that the staff-neutral model is most likely to inspire confidence in the motives that drive the court to establish an ADR program, most likely to signal that the court values ADR processes, least likely to inspire feelings that ADR processes are second rate and that litigants whose cases proceed through an ADR program are second class, most likely to communicate that the court defines itself as a service-oriented institution, and most likely to inspire a sense of gratitude toward the court and a feeling of connection to our society.

Two models seem likely to inspire the most confidence in the motives of the neutrals—the staff-neutral model and the model that relies on service by unpaid volunteers. The neutrals may enjoy the greatest presumption of respect under the staff-neutral model. The model that could be next most attractive from this perspective is the model in which an outside organization orchestrates the delivery of the services by the neutrals—as long as the particular outside organization enjoys widespread respect in the affected parts of the community.

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Comparing the models with respect to various dimensions of “democratization” yields a more complex picture. The economic and procedural barriers to participation are likely to be lowest under the staff-neutral model. Barriers to participation based on fear, ignorance, or distrust of the process and its purposes also probably are lowest under this model. Similarly, this model probably is least likely to provoke concerns about conflicts of interest or biases in the neutrals.

On the other hand, the staff-neutral model is clearly inferior to the extent that a visibly diverse panel of neutrals is important to inspiring confidence in the political or moral integrity of a program, or confidence in the capacity of the neutrals to understand and appropriately empathize with the litigants’ real-world circumstances. Models that use large pools of neutrals offer obvious advantages from these perspectives. These models also offer courts a substantially greater capacity to provide parties with neutrals who have subject matter expertise—at least if the goal is to provide such expertise to a wide range of cases.

Models that rely on large pools of neutrals<sup>98</sup> also are superior with respect to two additional aspects of “democratization”—both potentially important. First, these models equip courts to offer ADR services to much larger numbers of cases than courts that rely on small cadres of professionals—on staff or otherwise. This would be a consideration of great significance to a court that believed deeply in the value (to litigants, as well perhaps as to itself) of its ADR processes *and* that believed that it could maintain an appropriate level of quality control over a large pool of neutrals.<sup>99</sup>

Second, models that use large and diverse pools of neutrals are superior vehicles for extending the reach and influence of ADR into more segments of our society. This is accomplished in two ways. One is by having the court’s program directly serve a larger, more diverse group of cases—so more litigants, in a wider range of circumstances, are exposed to the value and the philosophy of ADR. The second way these models extend the influence of ADR is by the effect that training and service has on the way the neutrals in

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<sup>98</sup> The model in which the court sends the parties into the private sector to retain a neutral, perhaps from a list the court maintains, could be included among those that offer the advantages described in this paragraph.

<sup>99</sup> There are two very different grounds on which a court might base a conclusion that it could maintain an appropriate level of quality control over a large pool of neutrals: the court could commit substantial resources and effort to quality control measures (e.g., training or monitoring), or the court could believe that bright, conscientious professionals serving as neutrals do not need much quality control. I do not know whether, or to what extent, the latter view is justified.

the program conduct themselves even when they are not serving as neutrals. The theory is that, once trained in ADR service, the neutrals will approach their other professional work (e.g., for lawyers, the other cases they litigate) with both the tools and the spirit of the ADR process in which they have been "indoctrinated."

We also confront something of a mixed picture when we examine the models' relative capacity to attract neutrals who have the appropriate set of attributes. While I am inclined to give a slight edge to the staff-neutral model, there are so many factors at play here that I have little confidence in this feeling. Models that rely on essentially pro bono service by experienced professionals have attracted very high quality neutrals—at least when the court asks them to serve only a few times a year. And it is not clear why high quality people could not be recruited by a court that pays neutrals (or firms of neutrals) at approximately market rates. The model that inspires the least confidence from this perspective is the model in which the court requires litigants to find and pay a neutral from the private sector.

It is not clear which model promises the greatest ability to retain the services of high quality neutrals. The risk of burn-out among staff-neutrals may be real, but also may lend itself to exaggeration. The risk that volunteers who serve only occasionally will drift away from a program also is real—but its magnitude remains unclear. And while one would expect occasional volunteers to bring considerable enthusiasm and energy to their neutraling work, there is some risk that they will be distracted or pulled away by their "real" jobs before the ADR process has exhausted its capacity to benefit the parties. Courts that can sustain the flow of payment at market rates to professional service providers might be best able to retain the services of high quality neutrals over time—but it is not clear that there are many such courts, or, at least, that ADR programs so funded could afford to service significant numbers of cases.

The neutrals' motivation to give a lot of themselves to their work, and the influence of performance enhancing incentives, appear greatest under the staff-neutral model—and, perhaps, under the model in which the court pays the neutrals at or near market rates. On the other hand, potentially role distorting pressures also may be greatest under these models. The model in which the neutrals would appear to be least vulnerable to such pressures is the model in which the court arranges to have an outside organization orchestrate the delivery of the ADR services. The staff-neutral model probably creates the greatest risk that the parties will equate the neutral with the court—an equation that could either enhance or distort how the parties behave in the ADR process.



## COMPARING STRUCTURES FOR DELIVERY OF ADR SERVICES BY COURTS

The staff-neutral model is clearly superior to most others in the two remaining arenas I have considered. This model promises to develop more sophisticated neutrals (people with more refined and sensitive process skills and a wider range of neutraling tools) faster than any other model—save, perhaps, a model under which a court pays market rates to professionals who work regularly in the ADR field. Neutrals working in these two models also are most likely, over time, to retain and to use appropriately their process skills and techniques.

The staff-neutral model offers far and away the most reliable and least expensive performance quality control. It is under that system that courts can have the most confidence that the way their neutrals carry out their work conforms to the procedural protocols and rules the courts have established. Finally, adopting the staff-neutral model also enables courts to avoid having to develop and administer potentially burdensome and intrusive systems for regulating service by providers from the private sector.

I close by re-acknowledging that I have not addressed a good many practical and other considerations that courts that are trying to choose between these models need to take into account. I hope, however, that this Essay will prove useful—by helping policymakers identify for themselves the values that they want to play the dominant roles when they decide how to structure the delivery of ADR services in their court or court system.

